United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

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76-7421

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 76-7421

ANTON PICINICH,
Plaintiff-Appellant,

against

CHRISTIAN HAALAND & BOISE-GRIFFIN STEAMSHIP COMPANY, INC.,
Defendants-Appellees.

SKIBS A/S SAMUEL BAKKE,
Defendant and Third-Party Plaintiff-Appellee,

against

JOHN W. McGRATH CORPORATION,
Third-Party Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

VOLUME II

JOINT APPENDIX

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THE WITNESS: Best estimate, fifteen to 20 feet.

Q Now, when the boom lifts or through the boom with the winch operating, the wire lifts off the number four trailer and it bumps against number three and number three does not have any stacking devices in its corners. And one other thing: that whatever deck lashings had been over or on the number three container have been earlier removed or laid slack. What is the, so to speak, stability situation of the number three container if it gets that bump?

A It is going to move it.

Q Mr. Langan, are these containers, when they are brought into port for offloading, as a matter of usual and proper practice, are they supposed to have stacking devices if they are two tiers high, in the corners?

A I would say yes.

MR. FRIEDMAN: Thank you very much, your Honor.

THE COURT: Mr. Kain.

CROSS EXAMINATION

BY MR. KAIN:

Q Mr. Langan, are you on McGrath's payroll as a hatch boss?

A Yes.

Q You get an annual salary?

A No, I get paid by the hour, by the week.

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THE COURT: Look, just take it easy. Speak loudly and slowly.

Q You come down from the Waterfront Commission hiring hall and you get paid on piecework, the number of hours you work, the number of days you work; is that right?

A More or less, yes.

Q You are not on an annual payroll for John W. McGrath Corporation as one of their employees, are you?

A No, I am not.

Q You are a member of the ILA, are you, sir?

A I am.

Q Before you heard about this accident, did you ever meet Mr. Picinich in the union hall?

A Oh, I've seen him around over the years, yes.

Q And have you worked at the same pier with him at Hoboken?

A He probably worked for me on numerous occasions.

Q Now, I think you told us that you had number four hatch assigned to you on the Concordia Viking on July 12, 1971.

A That the best of my recollection.

Q How many containers were on deck at number four hatch at that point?

A Well, I really couldn't give you an exact number.

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I would say four, possibly six.

Q Are you talking now about both sides of the deck at number four hatch?

A Yes.

Q So that your recollection there was a total at number four hatch of four to six containers?

A Four to six.

Q And at the time of Mr. Picinich's accident, how many containers had your gang discharged to the pier?

A Well, if I was working in the hatch I had removed all that was in my way. I had taken all off that were by number four hatch.

Q And if you recall, were all the containers discharged from the deck of number four hatch before you went into the hatch? I'm referring now to your gang.

A I understand who you are speaking of. I would say yes.

Q Do you know how many gangs of longshoremen were working aboard that ship on the day of this accident?

A No, I don't.

Q How many gangs were working in number four hatch?

A I would say that we started with one and possibly when the containers were taken out maybe another gang was brought in.

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Q What time of day did this accident happen?

A In the early morning. Maybe, well, nine, 9:30.

Q Nine or 9:30?

A Some place in and around there.

Q And how long did it take your gang at number four hatch to discharge one of these containers from the deck to the pier?

A Well, the rigging usually takes about half an hour.

Q That would be about 8:30 before you started taking them off?

A Yes, we could take six containers off in another 35, 40 minutes. Less than that perhaps.

Q Is it your testimony it took your gang approximately five minutes to discharge one of these containers once your booms were rigged at number four hatch?

A It is possible to do this assuming I did have six containers. I'm not quite clear in my own mind whether I had six containers or not.

Q Is it your testimony that your gang, once the hatch was rigged for discharge, could discharge one of these containers every five minutes approximately?

A Yes, I would say so.

Q And the containers you discharged at number four

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hatch, were these loaded in any way or were they empty containers?

A They could be either one. I'm not being facetious. They could be either because we can pick up the five ton with the gear they allowed us to use.

Q Were the containers on deck at number four hatch empty or loaded?

MR. FRIEDMAN: I think the objection --

THE WITNESS: There is no way for me to tell him that, your Honor.

THE COURT: Then you don't know.

Q Isn't it necessary for the hatch boss to know the weight of the draft he is going to pick up with the gear?

A Isn't it necessary for a hatch boss to know the weight?

Q The weight of the draft.

A I didn't quite hear all what you said. But, yes.

Q So at least on July 12, 1971, you had to know the weight of these containers that were on deck at number four; right?

A Well, I could be told, as I usually am, by the stevedore in charge of the pier, what I am going to pick up is well within the limits of the booms. Then I wouldn't

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have to worry about the weights.

Q But you don't remember whether you were told or you don't remember anything about the weight; right?

A If I picked them up single gear I was probably told they were light enough to pick up with single gear.

Q What were the capacity of the booms at the number four hatch?

A Five ton.

Q And how about the winches, what were the winches, what was their capacity?

A The winches, this I wouldn't know. I wouldn't know about the winches.

Q I'm sorry?

A I wouldn't know about the capacity of the winches.

Q Were these double gear winches at number five or single gear, do you remember?

A On the Viking? I think they are single.

Q Single gear?

A I think so. That is only on conjecture.

Q I said number five. How about number four where you were working?

A Number four is single in the forward end and double in the after end.

Q Was there a jumbo boom at number four hatch?

A A jumbo?

Q At the Concordia Viking.

A I don't believe so. I could be wrong.

Q It is your recollection the accident happened at 9:30 and at that time you were actually working inside the hatch, your gang?

A Yes.

Q And you were discharging what from number four hatch?

A General cargo probably.

Q I don't want probably and I don't want you to guess. Do you have a recollection as to what type of cargo you were discharging?

A I could only give you general cargo. I would like to give you what you want but I can't.

Q Tell his Honor and the ladies and gentlemen of the jury what you mean by general cargo.

A General cargo in the terms of our business means any cargo that we can handle that is not crated. It could be anything from apples to oranges, it could be machine parts. It could be most anything. You name it, that is general cargo as far as we are concerned. Unless it is a special package.

Q Does it have any weight limitations, general

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cargo?

A General cargo?

Q Yes.

A General cargo runs from one pound to two, three ton.

Q Your gang was discharging using house falls, were you?

THE COURT: Using what?

MR. KAIN: House fall.

A Yes.

Q Now, at any time before this accident, did you get more than one gang into number four hatch?

A Before the accident?

Q Yes.

A I doubt it very much. I can't recall that, to be sure.

Q What I am trying to get from you, Mr. Langan, is your present recollection of the events of this day. I don't want you to guess at it, I don't want you to speculate. If you don't know, will you please tell me? If you do know, then also please tell me.

Was there more than one gang working at this hatch before this accident?

A To my best recollection, no. Just the one.

Q And you already told me that you didn't recall whether you took all of the containers on deck off at number four; is that correct or is that incorrect?

A I told you we took them off. If they were there when the ship came in we took them off. How many, I don't know.

Q On both sides?

A Yes.

Q And after the containers were taken off, did your gang open the hatch at number four?

A My gang went down into the hatch and I believe on the Viking they have the automatic opening. So the crew would have to open up the hatch.

Q It is your recollection then that the crew opened up the number four hatch; is that correct?

A Yes.

Q Now, before this accident, how long had your gang been working in number four hatch?

A I beg your pardon?

Q How long had your gang been working down in number four hatch before this accident?

A Probably just gotten down in there. Because I was going down to see what was going on.

Q Had you discharged any drafts from number four

before this accident from inside the hatch?

A To my best recollection, no.

Q Where were you when the accident happened? Were you on deck, down in the hatch?

A Yes. I was just getting ready to climb down the ladder between the upper 'tween decks and the hatch.

THE COURT: Wait a minute. Let me hear the question and answer.

(Question and answer read)

Q Where was the ladder that you were getting ready to descend?

A Midship's forward. Number four hatch.

Q That is the forward end of number four hatch?

A Correct.

Q Was this a hatch that led down inside the hatch square, the hatch opening?

A Yes.

Q That is the ladder you were going down?

A Yes. It is an open ladder.

Q And had you or were you looking down at this ladder at all at the time of this accident? What were you doing?

A At the time of the accident?

Q Yes.

A At the time of the accident I was looking at the container because I heard the thud.

Q You are speaking too fast for me.

May I have that answer reread?

THE COURT: Let the reporter read it.

(Answer read)

THE COURT: I tell you, I'm not clear on your position. You said something about ladder, 'tween decks. What was that again?

THE WITNESS: A ladder that climbs over the coaming of the hatch and it is right midships.

THE COURT: What is a 'tween deck?

THE WITNESS: That is what they call a shelter deck. It is a cargo space just under the main deck.

THE COURT: You got the main deck and then the hatch coaming at the main deck; right?

THE WITNESS: Yes.

THE COURT: Then there would be a ladder going down into the hatch?

THE WITNESS: Correct.

THE COURT: And the first level you reach would be a 'tween deck?

THE WITNESS: Yes.

THE COURT: It is between the decks, it is a level

between the decks; right?

THE WITNESS: Right.

THE COURT: And had you gotten to the 'tween decks? Where were you at the time?

THE WITNESS: I hadn't gotten my leg over the coamings yet. I was just getting ready to go, I heard the thud and I saw the man going over the side.

(Answer read)

Q Now, Mr. Langan, I think you said this was an automatic hatch cover?

A Pardon?

Q This was an automatic hatch cover?

A I believe so.

Q Would that be known as a McGregor type hatch?

A Yes.

Q That is a hatch that folds up?

A Folds up accordian shape, yes.

Q On the Concordia Viking, would you tell me when these hatch covers on the weather deck were in the open position, where were the hatch covers or where was the hatch cover?

A Where were the hatch covers?

Q Yes. When the hatch square is open, where were the hatch covers?

A They folded back underneath where the men work. The deckmen are up on the upper level and the hatch covers fold back underneath them.

Q Just back under the deck house; is that what you mean?

A Yes.

Q And at the time were you standing between the forward hatch cover and the coaming?

A There are no forward hatch covers. There are no forward hatch covers. Everything goes to the after end.

Q Everything is at the after end?

A That's right.

Q Now, while you were on deck at number four hatch you couldn't see what transpired at hatches number one, two, and three, could you?

A No. Impossible.

Q So it is a fair statement, is it not, that from number four hatch there is no way you can tell what the longshoremen, assuming they are working the forward hatches, you had the ship's house in between and you could not see what is going on; isn't that so?

A Yes.

Q So your knowledge of activities aboard that ship on this morning is confined to your own hatch and whatever you

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may have observed at number five; is that accurate?

A Yes.

Q Now, I think you made some mention of inshore list. Is that so?

A Yes.

Q And when did you first notice this inshore list?

A When did I first notice it?

Q Yes. Was it on the ship when you came to work that morning?

A It might very well have been but not as pronounced.

Q My question is: did you notice it when you came to work that morning?

A Not necessarily.

Q You didn't. How long after you had been working did you notice or first notice the inshore list, about what time?

A My deckmen told me they have to shift the boom a little bit offshore --

THE COURT: Slower, please.

THE WITNESS: I'm sorry. When my deckmen asked me if they could spot the boom a little bit more offshore because she was trailing -- the fall was trailing inshore. Then I knew there was a list.

Q Is that the only thing that indicated a list of

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the ship to you?

A At that particular moment, yes.

Q It wasn't otherwise observable except you noticed that this inshore fall, I think you said, was trailing; is that what you said?

A Yes.

Q Do you remember where the up and down boom, the offshore boom, the port boom was located, where it was spotted at number five hatch?

A Right over the top of the four containers. It should be right in the cross section that you have drawn there.

Q Well, could you tell me where? On top of this container, this container, this container, this container, or where (indicating)?

A If you want me to be specific and say it was right here, I can't do that.

Q I want you to tell me based on your experience where it should, in your opinion, have been spotted.

A Where it should have been. Right in the center of your cross.

Q Right here (indicating)?

A Yes.

Q Where I have that X?

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A Yes.

Q That is where you say it should have been spotted; correct?

A Yes.

Q Other than this slack or this drag you had on this inshore fall, did you experience any other difficulty in performing the work your gang was doing because of this inshore list you say that was on the ship?

A No.

Q Do you know what these containers weighed at number five hatch?

A No, I do not.

Q Do you know what one of those containers weighs empty?

A Approximately a ton and a half.

Q Could you tell me what material, if you know, the containers at number five hatch were made of?

A More than likely steel.

Q Is that your recollection, they were steel?

A Yes.

Q Now, after this accident occurred, did you go back to number five to see what was going on?

A Yes.

Q And when you got there I take it you told us that

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you saw this number three container did you say akimbo; is that what you said?

A Yes.

Q You mean that this end was inboard and the after end of number three was outboard?

A No. Just the opposite.

Q The after end was inboard?

A Yes.

Q And the forward end was outboard?

A Yes.

Q Now, how about this number one container, was there any change in the position of that container?

A Not that was noticeable.

Q Not noticeable?

A No.

Q How about the number two container, was there any change in the position of that container?

A No. I don't believe so.

Q And at the time you got back there where was the number four container?

A It was on the dock, I guess.

Q Was it actually on the dock by the time you got there?

A It wasn't there (indicating).

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Q How long from the time you saw Mr. Picinich going over the side, as you put it, how long after you witnessed that did it take you to get back to number five?

A Oh, maybe half hour.

Q A half hour?

A Wait awhile. What are you talking about?

Q I said from the time you looked up and you saw Mr. Picinich going over the side and you were at the forward end of number four hatch. How far is that approximately from number five hatch?

A Approximately? Number four hatch is 22 feet, 24 feet long. Let's call it 30 feet.

Q And how long did it take you to go from the forward end of number four hatch back to number five hatch to see what happened?

A Well, I didn't go back to number five. I ran to the side of the ship to look over to see the man, which is half the distance.

Q To the offshore side?

A Yes.

Q And where did you go to the offshore side, at number four or number five?

A Number four hatch.

Q When you got to the offshore side you looked over,

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you saw Mr. Picinich struggling in the water, I think you said.

A Yes.

Q Had anyone thrown him a life ring at that time?

A Yes. They threw quite a few things.

Q And did you observe Mr. Picinich get hold of this life ring?

A Yes.

Q Now, how long after you looked over the side and saw Mr. Picinich in the water did you observe the situation with the containers at number five hatch offshore, which you described to us?

A Well, I'll say within a matter of 20 minutes, 25 minutes.

Q You didn't look at them for another 20, 25 minutes?

A Because I went down into my own hatch to see what was going on down there.

Q You went down there?

A To my own hatch to see what was going on down there.

Q You came up at some later time and looked at these containers?

A I came up, the gang had stopped working to take care of the man in the water. When I came up the container

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was still there.

Q Did you at any time after you saw Mr. Picinich fall into the water and went to the port side, did you at any time before this 20 minute period look at these containers or did you just look over the side and then go back down the hatch?

A Looked over the side and went back down the hatch.

Q You did that without looking to these containers at number five hatch; is that right?

A Yes.

Q When you looked at these containers at number five hatch, did you observe any damage to the containers?

A Which containers are we talking about?

Q The containers you saw at number five hatch when you looked there.

A Damage, no.

Q You didn't see any dents or any holes or anything in the containers?

A There might have been a dent in the number three, the number three that got hit.

Q Did you see it?

A No, I did not.

Q Did you look to observe whether there was any

damage to these containers?

A No, I did not.

Q Now, when you looked at these containers was there any dunnage between the upper and lower containers at number five hatch on the port side at the time you first looked at them?

A No, there was not.

Q No dunnage. Was there any dunnage underneath these containers, if you recall?

A No, there was not.

Q And was there any securing of any kind on these containers?

A Yes.

Q What kind of securing?

A There was wire lashing around them and also at the base of each container there was a chocking between the side of the ship and the container and the container and the hatch opening.

Q And when you --

A In other words, they were fairly well boxed in with timber.

THE COURT: Mr. Kain, continue.

BY MR. KAIN:

Q When you looked at these wire lashings you referred

to, were they secured to anything?

A They were all taken off.

Q Well, did you observe the boxes while the lashings were in place?

A I'd have to say no. I'd have to say no.

Q Now, Mr. Langan, in the years you have been a longshoreman you are familiar with lashing gangs on the various piers, aren't you?

A Yes.

Q And at piers A, B and C in Hoboken, do the longshoremen working for McGrath sometimes -- sometimes do they have a lashing gang?

A No.

Q They don't use lashing gangs?

A They have this company that comes in and does that work, Costello and Sons. They do all the lashing.

Q Are you familiar or have you in the years you have worked at piers A, B and C in Hoboken or any place else as a longshoreman, are there unlashing gangs?

A Oh, yes.

MR. KAIN: Will your Honor give me just a moment?

THE COURT: Yes.

(Pause)

MR. KAIN: No further questions.

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THE COURT: Any questions, Mr. Leonard?

CROSS EXAMINATION

BY MR. LEONARD:

Q What is your longshoreman's number?

A 01011.

Q What is your Social Security?

A 140-01-4931.

Q Now, when you work for stevedores beside McGrath, you work for McGrath's competitors now and then, don't you?

A I haven't in a good long while.

Q Doesn't your gang ever obtain employment with other stevedores when there is no work?

A In the last 20 years on three occasions we were loaned out by McGrath to companies doing work in Port Newark, four times.

Q That you say is the only time in the last 20 years you have worked for somebody else other than McGrath?

A I didn't say that. I worked for McGrath for about fourteen years. Before that I worked for Virginia Stevedore, at pier A and pier B. Prior to that I worked for International Terminal Operators. During the last five years I worked for McGrath.

Q Your testimony is you have not worked for any other stevedore beside McGrath during that time?

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A To the best of my knowledge, yes.

Q You say that the first time you ever mentioned this case to Mr. Heller was on this very last Saturday; is that so?

A That is correct.

Q How did the subject of Anton Picinich arise during this conference with Mr. Heller?

A It came up in a general conversation really.

Q Did you mention the name of Anton Picinich first?

A No, I did not.

Q Was it Mr. Heller who first mentioned the name of Anton Picinich?

A My friend was there to see Mr. Heller and he had been very busy --

Q I didn't ask you.

A You are asking me to tell youhow I came into a conversation.

Q My question is was Mr. Heller the first to mention the name Anton Picinich this last Saturday.

A Yes.

Q Now, you say that you were in Mr. Heller's office to help a friend; is that so?

A Yes. Give testimony for a friend.

Q And this friend is the plaintiff in a personal

injury action?

A I believe so.

Q And he is represented by Mr. Heller?

A Yes.

Q Did Mr. Heller ask you to come over to his office?

A Did Mr. Heller ask me? No, he didn't. My friend asked me to go to Mr. Heller's office with him

Q You came along to help your friend?

A By all means.

Q By the way, you say that Mr. Picinich from time to time works for you; is that so?

A Yes.

Q Is Mr. Picinich a willing worker?

A I never had any complaints with him.

Q Does he do whatever he is told by you?

A Yes. As does everybody else.

Q When Mr. Picinich works for you, does he work on the deck or in the hold?

A He works in the hold. Sometimes he works on the deck.

Q Have you had occasion to observe his activities in the hold when he works for you?

A Yes.

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Q When was the last time that Mr. Picinich worked for you?

A That is very hard to answer.

Q Approximately?

A Sometime within the last five years he worked for me two, three or four times.

Q During that time you have no complaints?

A No complaints. He is a good man.

Q Has he ever made any complaints to you?

A Complaints to me?

Q Yes. About working conditions or anything?

A He probably has. We have a lot of aggravation every day.

Q What language do you speak, Mr. Langan?

A A little bit of everything but mostly pretty good English.

Q Do you speak Croation?

A No.

Q Can you communicate with Mr. Picinich in the English language?

A Yes.

Q Now, you say that the crew removed the hatch covers from number four hatch on the day of the accident?

A They opened up the hatch, yes.

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Q What was done with the hatch covers after the hatch was opened?

A There is no hatch covers. Hatch covers all go right back.

Q Roll right back?

Yes.

Q How long did it take the crew to open the hatch opening at number four hatch on the day of the accident?

A It only takes minutes.

Q Tell me how many.

A It only takes minutes. Three, four minutes, five minutes.

Q And the crew performed this opening job when the containers were finished being discharged from number four at any rate?

A Yes.

Q There were still containers at number five to be discharged; is that your testimony?

A Yes.

Q When the hatch was opened at number four was your vision clear so that you could see what was going on at number five?

A Yes.

Q What gear was the gang in number four, that is your

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gang, using to discharge the general cargo that you that you testified about before?

A What gear were they using?

Q Yes.

Using --

Q Pallets, nets, pie plates, slings?

A Airplanes.

Q Will you tell us what an airplane is?

A Yes. It is a platform made of wood through which wire straps are passed. They drill holes in each corner. They pass the wires underneath and they come up on the side and they have an eye.

Q And what kind of cargo is discharged from the hold of the vessel by means of airplanes?

A General cargo. Most anything.

Q Well, would you discharge loose apples? You said apples. They have to be in some container, don't they?

A Not necessarily.

Q Would you discharge loose apples?

A I have never had the occasion.

THE COURT: We really don't have to get into apples.

Q You have no personal recollection of the exact nature of the cargo beyond general cargo that you were dis-

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charging; is that so?

A No, no.

Q Now, when the 'tween deck area is opened by opening the main deck hatch, what is the responsibility, if any, of the hatch boss with regard to checking the 'tween deck area?

A Safetywise?

Q Yes.

A Make sure that everything is secure, that the floor the men are going to work on is clear; that all beams are in place. If you are going to be working on top of them, all beams to the next deck are in place and locked. In general, a safe place to work.

Q So that it was your responsibility as hatch boss of the number four gang, was it not, to devote your attention to and check the number four 'tween deck hatch area in preparation for the commencement of general cargo from that area; is that not so?

A True.

Q Is that the activity that you were engaged in at the time of the accident?

A Not at the time of the accident, no. At the time of the accident, no, I was go'n down to the hatch to do exactly that.

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Q That was the purpose of your going down to that hatch?

A Exactly so.

Q Were you actually on a ladder when you were doing this?

A I might have had one leg over the coaming.

Q Were you going down facing the rungs of the ladder or facing away from the rungs?

A If you are stepping over the coaming to go to a ladder, you are looking to the after end of the ship. After you get your foot into position, you turn your back and go down.

Q In response to my question, were you facing the rungs of the ladder or were you facing away from the rungs of the ladder?

A As I stepped over the coaming I was facing away from the rungs of the ladder. I was facing toward the after end of the ship.

Q As a prudent longshoreman of many years experience you were devoting your attention to what you were doing at that moment; is that so?

A Exactly aware of where my next foot was to go, yes.

Q Your attention was first called to in any event at

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number five by a sound, was it not?

A Yes.

Q That sound you characterized as a thud?

A Yes.

Q It was then for the first time that you looked at the number five hatch area; is that so?

A Yes.

Q Now, did the crew engage itself in the process of removing the hatch covers from number four hatch at the same time as or after the completion of the discharge of the containers from number four? In other words, did they discharge containers from number four and then open the hatch or did those two events go on simultaneously?

A One at a time.

Q Which first?

A The containers were taken off.

Q How did you notify the crew to come and open the hatch?

A Usually somebody around, a deck officer around, a boatswain. Any member of the crew. They are congenial people. We say we want it open and they do it.

Q Did you notify a member of the crew to come open the hatch?

A Yes.

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Q Where was this member of the crew?

A Probably standing by. Usually if I tell them I got two more lifts to go from the deck I tell him and then I want it opened up.

Q Do you have a recollection of where this individual was at the time you notified him to start opening the hatch?

A No, I don't.

Q At any rate, you performed that job of notifying the member of the crew and then there occurred a period of about four or five minutes that the crew actually opened the hatch door; is that not so?

A Yes.

Q And it was after this and after you started to go down to the hatch at 9:30 -- correct?

A Some place along there..

Q That you heard the sound which you associated with the happening of the accident. Am I correct so far?

A Right.

Q Who is your immediate superior on this ship operation?

A John A-r-n-a-c-o-n-e.

Q What is his title?

A He is the ship's stevedore.

THE COURT: How do you spell that?

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THE WITNESS: A-r-n-a-c-o-n-e.

Q Who was Mr. Arnacone's superior?

THE COURT: John Arnacone?

THE WITNESS: A-r-n-a-c-o-n-e.

THE COURT: Thank you.

Q Who is his superior, Mr. Langan?

A Probably Warren Dandorf.

THE COURT: Warren who?

THE WITNESS: Dandorf, D-a-n-d-o-r-f.

Q Who was on July 12, 1971, Mr. C. Mulvaney?

A Chris. He is the terminal superintendent.

Q Was he an employee of John W. McGrath Corporation?

A I think he is the number one man.

Q He was the top man at the pier?

A You better believe.

Q By the way, Mr. Langan, as hatch boss, do you tell anybody in the John W. McGrath organization what you did during a given period of time working aboard a ship?

A No. They come around and they check it quite regularly.

Q They ask you?

A Yes.

Q And when you start a job I suppose you have to let them know, don't you?

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A Yes. They come and give us the orders to tell us what to do.

Q When you start a given job they want to know when you start?

A Yes.

Q When you finish a job they want to know when you stopped?

A Yes.

Q That is for purposes of billing the ship; isn't that so?

A Yes.

Q As a matter of fact that information is capsulized and assembled into an activity sheet. Do you know what an activity sheet is?

A Yes.

Q What is it?

A The happenings at each hatch hour by hour as they go through the weekday.

Q Is that a document which the stevedore keeps in its business?

A I would think so.

Q And for purposes of billing the ship it is important for the stevedore, I suppose, to know when its gangs are doing what?

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A No question.

MR. LEONARD: I would like this marked for identification, please.

xx (Defendant's Exhibit K marked for identification.)

Q Can you identify Exhibit K for identification?

A Can I identify it?

Q Yes.

A No. Yes, I can see now, yes.

Q Please tell us what it is.

A An activity sheet.

Q What is the name at the bottom?

A The name at the bottom, Chris Mulvaney.

Q He is the man whom you described as stevedore superintendent; is that not so?

A Yes, the terminal superintendent.

Q I direct your attention to --

MR. FRIEDMAN: Objection. You can't finish that question without referring to a document not in evidence.

MR. LEONARD: I will offer this in evidence.

THE COURT: Any objection?

MR. FRIEDMAN: I never saw it.

THE COURT: Look at it and we will take our afternoon recess now.

(Recess)

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(In open court - jury present)

MR. LEONARD: With the consent of counsel I have physically detached certain sheets of Defendant's K for identification which bear on dates other than the 12th. There are now left two pages and I understand there is no objection.

THE COURT: Received, Exhibit K.

(Defendant's Exhibit K received in evidence.)

xxx

CROSS EXAMINATION CONTINUED

BY MR. LEONARD:

Q Mr. Lanran, I ask you to look at Exhibit K in evidence and tell me whether or not there is on that exhibit an entry which pertains to your gang on July 12, 1971.

A Yes. The top of the second page.

Q Is there a note there "Bill"?

A Yes.

Q Is that you?

A Yes.

Q That is number four hatch?

A Yes.

Q Can you tell me when that indicates you started work at number four hatch on July 12, 1971?

A Eight o'clock in the morning.

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Q What did you do, what did your gang do according to that?

A According to this from eight to 8:30 we rigged. From 8:30 to ten we discharged empty containers.

Q Now, when does that exhibit indicate that you started general cargo operations?

A At ten o'clock.

Q And what cargo were you working with then?

A Bags.

Q Do you have any reason to challenge the accuracy of that account?

A None whatsoever.

Q Now, Mr. Langan, you told Mr. Friedman and Mr. Kain and myself that you were going down into the hatch at the time that you heard the noises which drew your attention to number five. Is that so?

A Yes.

Q Can you tell me, Mr. Langan, is there a coaming around the hatch at the point where the ladder is that you were using at that exact moment?

A Yes.

Q How high is that coaming?

A Approximately that high, maybe a little lower (indicating).

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Q You are indicating the jury rail which is about three feet high?

A Yes.

THE COURT: About how high?

MR. LEONARD: Three and a half feet high.

THE WITNESS: Give or take.

Q To get onto that ladder I suppose you have to put a foot over it first?

A Correct.

Q Do you recall which foot you put over the coaming of the hatch so as to get onto the ladder leading down into the hatch?

A My right foot.

Q Now, had your right foot actually contacted a rung of the ladder at the time that you heard the thud?

A Possibly.

Q Well, do you have a recollection?

A No, no.

Q Had your left foot come over the coaming of the hatch at the time that you heard the thud?

A No.

Q Where was your left foot at the exact moment that you heard this thud?

A Probably on the deck.

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Q Do you recall whether you turned your head to the right or to the left when you looked in the direction from whence the thud came?

A I had to look to my right to go in that direction.

Q By the way, was there a McGrath winch operator at number five hatch at the time that you heard the thud?

A Yes.

Q Where was that McGrath winch operator?

A Where was he?

Q Yes.

A There is a superstructure back there. I don't know what you people term it. We call it a superstructure.

Q By a superstructure do you mean winch platform?

A Yes.

Q The winch operator I take it sits on top of some sort of platform?

A Either sits or stands, yes.

Q How high above the deck is that winch platform, if you know?

A Eight to ten feet.

Q How wide is that winch platform?

A It usually extends to either side of the hatch and back of it.

Q For the entire width of the hatch?

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A Yes, usually. On this particular ship, yes.

Q It did?

A Yes.

Q Is that winch platform built on stilts or is it a solid mass of metal supporting it?

A It is a deck that is supported by stanchions fairly well spaced positions.

Q What I am asking you is can you see under or through the support for the winch platform?

A Can I see or can the winch man see?

Q Can you see from your position with one foot on the railing at number four hatch about to go down, can you see or could you see under or through the support for the winch platform?

A I could not see number five hatch, if that is what you want. I could see the deck but I couldn't see the hatch.

Q At the time that you looked up from your position in number four hatch with your foot on the rung of the ladder to go down, is it your testimony that you then and there saw Anton Picinich on top of a container?

A Yes.

Q That is your testimony?

A Yes.

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Q That container, your testimony is, was the after outboard container?

A Correct.

Q Did you see his entire body at that time or did you see part of his body?

A I saw his whole body.

Q So that you were able to see from his feet to his head?

A Yes.

Q Was M. Picinich at the time that you saw him in the air or on the container?

A He was staggering back, he probably took one or two steps and then he went over the side.

Q When you say he was staggering back, when you saw him at that exact moment was Mr. Picinich facing outboard toward the water or inboard toward the ship?

A He was looking toward the ship.

Q So that in staggering backwards you are telling us that he was staggering backwards toward the edge of the container; is that so?

A Yes.

THE COURT: By the edge, you mean the outboard edge?

THE WITNESS: Yes.

Q Now, is it your testimony that you saw Mr. Picinich thereafter in the air?

A Yes.

Q When Mr. Picinich was in the air, as you saw him, was he facing outboard toward the water or inboard toward the ship?

A He might have been both. The last I saw him he was flailing around in every direction, with nothing underneath him.

Q So you can't tell us which way he was facing when he was actually in the air and you saw him?

A No, I could not.

MR. LEONARD: I have no further questions of this witness.

THE COURT: How high was your head above the deck when you saw Mr. Picinich? How high was yourhead above the deck?

THE WITNESS: Well, an extension of my body above the top of the coaming. I had one foot on the deck.

THE COURT: One foot on the deck?

THE WITNESS: Yes. The other foot over the side.

THE COURT: You are how tall?

THE WITNESS: Slightly over six feet.

THE COURT: One foot was on the deck, you were

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standing and your head would be six feet above the deck?

THE WITNESS: Approximately so.

THE COURT: All right.

Redirect?

MR. FRIEDMAN: Just a few, your Honor.

REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mr. Langan, when there is offloading work to be done on deck and then additional offloading work to be done by going down into the hatch and starting to lift the cargo, can you tell me as a usual practice, do you go down into the hatch before any of the working gang, the other members of the gang go down there?

A Not necessarily.

Q Sometimes you do, sometimes you don't?

A Sometimes I do, sometimes I don't.

Q Now, the work that was going on from 8:30 until ten, according to the activity sheet, Exhibit K; was that work that was going on on deck or down in the hatch?

A No, that was in the shelter deck, shelter deck or lower 'tween.

Q Maybe you didn't hear my question. From eight to 8:30 you were rigging?

A Right.

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Q From 8:30 to ten you were discharging containers; is that right?

A That's right.

Q Now, that work, the 8:30 to ten work of discharging containers, was that deck work?

A Yes.

Q So that during that time period were all or most of the members of your working gang working up on the deck?

A Yes.

Q And unless you had gone down in advance of the gang to check out the hatch area, where would you have been?

A Right where I belong, right there where the men were working. I couldn't go down the hatch because it wasn't opened to begin with.

Q So that is on the deck?

A Yes.

Q About how many feet roughly was that from where the Picinich accident occurred, roughly?

A 40, 45 feet.

Q Now, do you have a clear recollection in your mind of getting over to the bulwark, the side rail, and seeing Mr. Picinich down in the water?

A Oh, yes, very definitely.

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Q Let me ask you this question, as best you can recall: approximately what was the distance from the ship's rail, the bulwark where you leaned over to look down, to the water surface where you saw him, about?

A Approximately, maybe eighteen to 20 feet.

Q And the place where he had fallen from on the top of the second tier, how high was that?

A That would have to be sixteen feet.

Q Now, just another couple of questions.

The container that was left behind -- by that I mean not the one that was lifted away but the one that Mr. Picinich had been standing on, when you looked at it after the accident the part of it -- was part of it, you already told us was akimbo so I don't want to repeat testimony. What I want you to tell us is how far was the part that was inboard inboard? Do you understand my question?

A I think so. I would say that the part that was inboard would be maybe just a little bit better than the center of the container that was still in back of it.

MR. FRIEDMAN: Can I hear the answer?

(Answer read)

Q So if these containers are eight feet wide, that would be in the neighborhood of four feet?

A Yes.

MR. FRIEDMAN: That is all. Thank you.

THE COURT: You may step down.

(Witness excused)

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ELWIN VANGSNES, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KAIN:

Q Captain, will you keep your voice up so I can hear you and his Honor and the ladies and gentlemen of the jury can?

A Yes.

Q Will you tell me, Captain, what is your present occupation?

A My present occupation is chief officer on a Norwegian ship.

Q What is the name of the ship that you are presently the chief officer of?

A Nonanfiord.

THE COURT: It is not the one involved in this case, right?

MR. KAIN: I understand that to be so.

Q Could you tell me, Captain, who are the owners of the Nonanfiord?

A The Vanger Steamship Company.

Q Is that a Norwegian Company?

A Yes.

Q Are you a Norwegian citizen, Captain?

A Yes, I am.

Q And is Norwegian your native language?

A That's right.

Q How long have you been going to sea, Captain?

A I started in 1951.

Q And how long have you been a licensed ship's officer?

A Since July, 1959.

Q And what licenses do you presently hold?

A Captain's license.

Q And is that an unlimited license, any oceans, any tonnage?

A That's right.

Q And would you tell me by whom the license you hold was issued?

A By the Norwegian government.

Q Now, Captain, in July of 1971 what was your occupation?

A I was a chief officer on the Concordia Viking.

Q And would you tell me, Captain, when you joined the Concordia Viking?

A I joined the Concordia Viking in March of '71.

Q March, 1971?

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A That's right.

Q And when did you leave the Concordia Viking?

A Late December the same year.

Q 1971?

A That's right.

Q And during your employment aboard the Concordia Viking were you always the chief officer?

A Yes.

Q Captain, I show you this book and ask you to look at it and tell me what it is.

THE COURT: Get it marked for identification.

(Defendant's Exhibit L marked for identification.)

A It is the log book of the Concordia Viking, the scratch log.

Q Would you tell me, Captain, in whose handwriting this log book is?

A Mostly it is my handwriting but some of the other officers have written in it, too.

Q And for what dates does it cover?

A From the 5th of March, 1971, until 19 September 1971.

Q Is that log book kept in a book which the ship is required to keep in the regular course of the ship's business?

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Yes.

THE COURT: I offer it in evidence, if your Honor please.

MR. FRIEDMAN: I believe it is in Norwegian but I won't object. I can't read it though.

THE COURT: Received.

xxx (Defendant's Exhibit L is received in evidence.)

THE COURT: Proceed, Mr. Kain.

MR. KAIN: If your Honor please, I am trying to get another exhibit.

MR. FRIEDMAN: Your Honor, I am assuming when and if Mr. Kain wants to use some portions he will give me some idea what it is because there is no way I can deal with it otherwise.

THE COURT: I am sure he will.

Proceed, Mr. Kain.

MR. FRIEDMAN: Mr. Kain, if you will represent what a document is I will be happy to accept it.

MR. KAIN: Cargo stowage plan.

THE COURT: That is received.

MR. KAIN: It has already been marked for identification.

xxx (Defendant's Exhibit L received in evidence.)

MR. KAIN: If your Honor please, may I offer in

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evidence the capacity plan of the Concordia Viking.

(Defendant's Exhibit M received in evidence.)

BY MR. KAIN:

Q Captain Vangsnes, will you look at this log book, which is Defendant's Exhibit L in evidence, and will you tell me, referring to this log book, when the containers carried aboard the Concordia Viking upon her arrival in Hoboken, New Jersey, when were they loaded and where?

A They were loaded at Damman, Saudi Arabia.

Q On what dates, Captain?

A On May 28, '71.

Q Was that when the loading commenced or when the loading finished?

A We commenced loading and we finished loading the following day, the 29th of May.

Q And would you look at that log book and tell me at what time on the 29th of May did you finish loading those containers?

A We finished loading the containers at 2:10 in the morning.

Q That is 2:10 a.m.?

A Right.

Q And does your log book indicate, Captain, when those containers were secured for sea?

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A They were secured as the loading was going on, and they were finished, secured, the 29th.

Q The 29th of May?

A Yes.

Q At what time, Captain, if it is indicated in the log book?

A At 5:00 p.m.

MR. FRIEDMAN: 5:00 p.m.?

Q 5:00 p.m. on the 29th?

A Yes.

Q Could you tell me when the Concordia Viking sailed from that port in Saudi Arabia?

A We sailed from Amman the 29th of May at 4:08 a.m.

Q In the morning?

A In the morning, yes.

Q And does that mean that for the next approximately twelve or fifteen hours after you sailed, these containers were being secured?

A Yes, that's right.

Q And would you tell me, Captain, how were they secured?

A They were chocked -- the bottom tier was chocked with wood and there was dunnage underneath them and there was dunnage in between the first and the second tier, and

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the top tier was secured with wires and turn buckles.

Q Now, Captain --

THE COURT: Just a minute. I think we should suspend now. Let me just hear the last answer.

(Answer read)

THE COURT: We will adjourn until ten. We will try to avoid any legal discussions which keep you sitting here and start promptly at ten. Go out now and I will talk to the lawyers for a moment.

(Jury leaves)

THE COURT: Now, I have read through Mr. Friedman's memorandum about the charge. I just want to say to Mr. Friedman I wasn't concerned with you having to prove causation as such, but it seemed to me the question of the cause was circumstantial evidence for or against the fact of movement. But if I feel that there is any confusion on that point I will certainly give an instruction to the jury so they know exactly what you have to prove and what you don't have to prove.

MR. FRIEDMAN: Just to pass that point quickly, I don't think I have handed it up yet but Judge Frankel charged a jury and I will hand up to your Honor a page which has Judge Frankel's language directed exactly to that point.

THE COURT: I have gotten requests to charge from

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the defendant and the third party defendant, but I don't think I have gotten any from you.

MR. FRIEDMAN: It did not come down this afternoon. I know it is typed. If I may, can I deliver them to your chambers tomorrow morning the first thing?

THE COURT: All right, I will get them tomorrow morning.

Now, just for the record we have motions; I take it.

MR. KAIN: Yes. Mr. Friedman, if he doesn't want to make any --

MR. FRIEDMAN: When I rest my case there are none whatsoever that I can make.

THE COURT: Proceed, Mr. Kain.

MR. KAIN: At this time the defendant moves to dismiss the negligence cause of action on the grounds that there is no competent evidence before the Court and this jury with respect to negligence on the part of the ship's officers. Also on the unseaworthiness grounds, on the grounds that plaintiff's testimony, the testimony of plaintiff and his fact witnesses is to a physical impossibility inasmuch as it is defendant's contention that it is physically impossible for this accident to have occurred in the manner testified to by plaintiff and his fact witnesses.

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On the further ground that Captain Ash's testimony, based as it was on assumptions made by Captain Ash and by no other witness in the case, aside from being incredibile it is defendant's contention these are assumptions which the captain is not entitled to make.

Accordingly the defendant contends that plaintiff has failed to make out a prima facie case primarily because it has failed to offer any competent testimony either as to ship's negligence or as to unseaworthy conditions.

THE COURT: Motions are denied.

Mr. Leonard, do you have a motion or do you join in those?

MR. LEONARD: I join with Mr. Kain in moving to dismiss the complaint, alternatively for a directed verdict, on the ground plaintiff has failed to sustain his burden to establish either the negligence of the ship or the unseaworthiness of the vessel, primarily on the ground of the testimony relied on by the plaintiff to support its claim is scientifically impossible or at best implausible to warrant rejection by the court of any such testimony and direction of the verdict.

THE COURT: Motions are denied.

MR. LEONARD: I have further motions. I move to strike the testimony on the report of Dr. Brown on the

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ground that the plaintiff, during the course of his direct presentation, has failed to establish any causal connection between the report of Dr. Brown and the observations he made and the happening of the accident. I have a memorandum of law prepared on that ground which I will hand up to the Court.

I move on the further ground that the report of a clinical psychologist does not have the same assurance of accuracy and trustworthiness as envisioned by the decision of the Court in the Yates case which has been heretofore relied upon by the plaintiff. Of course, I renew my initial objections to the admission of Dr. Brown's report at any rate.

All those objections are embodied in the memorandum of law which I have handed up to the Court just now.

I would further move, should the Court be inclined to strike the report of Dr. Brown, that the jury be instructed to disregard it in its entirety and pay no attention to it in their deliberations.

THE COURT: Where is the case? Is there a case that holds that a psychologist's report is so incompetent that it cannot be used?

MR. LEONARD: Negatively in the case of U.S. Steel versus Lamp, you will notice an observation by the

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Court in that case that there is a substantial difference between mental and physical disorders and that the testimony there was not up to the same degree of trustworthiness as would it be if a doctor rendered a report on a physical disability.

Also the Court in Morris versus U.S. discussed that question.

THE COURT: Those motions are likewise denied.

MR. LEONARD: One further motion and that relates to the report of Dr. Shapiro. The plaintiff in this case has made certain claims of physical disability. Those claims related to conditions which existed for a period of approximately ten months. The plaintiff called to buttress the claim of physical disability Dr. Matlas who did not testify as to any claim of permanent disability in distinction to his report.

Dr. Shapiro reviewed a number of doctors' reports, some of which ascribe a permanent disability to the plaintiff on an orthopedic basis. We have had those doctors testify and I submit that the mere review and citation by a doctor, a psychologist or a psychiatrst no less, of reports of physical disability in no wise is competent to establish the facts of that disability and that the jury will be misled into assuming that Dr. Shapiro's review of those reports

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constitutes some evidence that they may find that there is a physical disability persistent. That is prejudicial.

THE COURT: What is this motion?

MR. LEONARD: Motion to strike such parts of Dr. Shapiro's report as they refer to reports of other doctors whom he reviewed which ascribe a permanent physical disability in part to the plaintiff.

I move further that the jury be instructed that they must disregard it.

THE COURT: I will deny that motion.

That concludes the motions?

MR. LEONARD: Yes, your Honor.

THE COURT: All right.

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rd/lf/473

ANTON PICINICH

vs.

CHRISTIAN HAALAND & BOISE-GRIFFIN
STEAMSHIP COMPANY, INC.

----- ---------- 71 Civ. 5357

SKIBS A/S SAMUEL BAKKE

vs.

JOHN W. MC GRATH CORPORATION

October 15, 1975

(In open court - jury present)

THE COURT: I apologize for keeping you. I had a criminal matter I had to take care of

As far as the trial schedule is concerned, there was an additional witness on the plaintiff's side, as you remember from yesterday, and some rather extensive further examination of Captain Ash. So we are not up to the schedule that I think I told you about last Thursday.

I think, though, it is realistic now to assume that the defense case and all the proof will be finished either by the end of the day or at some point tomorrow. Then we will have summations. Now, if I can get my charge in tomorrow, I will, and then you can start your deliberations.

On the other hand, if the evidence and the summations go towards the end of the day it is never a very

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good idea to charge a jury at the end of the day, so I would charge you first thing Friday. That is the best prediction I think I can make right now.

You go ahead with your witness, Mr. Kain.

E D W I N V A N G S N E S, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. KAIN:

Q Captain Vangsnes, will you look at the cargo stowage plan, which is Defendant's Exhibit H in evidence and which is before you, and will you tell me, Captain, referring to that stowage plan when the Concordia Viking sailed from Saudi Arabia how many containers were stowed on deck at the number one hatch?

A Four empty containers.

Q Four empty containers?

A That's right.

Q And how were they divided?

A Two on each side.

Q And were they stowed two containers high, Captain, or side by side?

A Two containers high. One on top of the other on both sides.

Q Now, will you look at your cargo stowage plan and tell me how many containers were stowed on deck at number

two hatch?

A There were six full containers and there were 26 empty containers.

Q That is a total of 32 containers, if my arithmetic is right; Captain?

A That's right.

Q Do you have a recollection or does your cargo stow plan show how they were divided at number two hatch?

A They were divided on both sides equally. That means sixteen containers on each side.

Q And how many high?

A Two high.

Q Two high, sixteen on both sides; is that correct?

A Yes.

Q Now, Captain, when you refer to containers stowed at number one or number two hatch, are you talking about the exact area adjacent to the hatch opening or does that area at the hatch that you are referring to, when you say they are stowed at the hatch, does that cover some further distance? Do you understand my question?

A Yes. Yes, it covers a further distance. It refers to the containers which was loaded by the gear from number two hatch.

Q And if I understand you correctly, some of these

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containers may extend a little bit beyond the hatch opening, say at number two, and a little after the hatch opening, say up to the area where the mast house is or the winch tables are located?

A That's correct.

Q Now, will you refer, Captain, to your cargo stowage plan again, which is Defendant's Exhibit H in evidence, and tell me how many containers were stowed on deck at the number three hatch?

A There was fifteen empty containers and one full container.

Q That is a total of sixteen?

A That's right.

Q And how were they divided between port and starboard?

A They were equally divided. That means eight on each side.

Q And were these containers all stowed two high or were they stowed in some other fashion?

A They were all stowed two high.

Q Now, after the number three hatch, Captain, you have the ship's house; isn't that so?

A Yes.

Q And that contains some of the living quarters and

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navigation bridge, things of that sort?

A Yes, that's right.

Q And does that ship's house extend from one side of the ship to the other?

A Yes.

THE COURT: I missed the last. Read the last couple of questions and answers, please.

(Record read)

THE COURT: Thank you.

Q Again refer to your cargo stowage plan, Captain, and tell me how many containers were carried on deck at the number four hatch? That is the first hatch after the house.

A At number four we had twelve empty containers.

THE COURT: How many?

THE WITNESS: Twelve.

Q And would you tell me, Captain, how the containers at number four hatch were divided between port and starboard?

A They were divided into eight containers on the port side and four containers on the starboard side.

Q And how were these containers stowed? How many of them were stowed two high?

A All of them.

So that you had two stowages of two containers

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high on the starboard side at number four and four stowages of two containers high on the port side, is that correct?

A That's correct.

Q Now, on the starboard side, these two stowages of two containers high, was it one behind the other or were they side by side?

A One behind the other.

Q Now, Captain, will you look at your cargo stowage plan and tell me, if you can, how many containers were stowed on deck at number five hatch?

A At number five there was eleven empty containers and one full container.

Q And how were they divided between the starboard side of the ship and the port side?

A Exactly the same was as number four. That means eight on port side and four on starboard side, two high.

Q Is there any indication in your cargo stowage plan as to the weight of the container which had cargo in it? I think you said there were eleven empties and one with cargo. How much did the loaded container weigh?

A The loaded container weighed five tons.

Q Would that indicate to you, Captain, whether or not this container was fully loaded with cargo or whether it

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was partially loaded?

A I can't say.

THE COURT: But the full one weighed five tons?

THE WITNESS: That's right.

THE COURT: Thank you.

Q Incidentally, Captain, do you know the weight of these containers that were carried on deck on this voyage, these 20 by eight by eight containers, the empty containers?

A They are two ton each.

Q Is that two long tons, 4400 pounds, or two tons, 4000 pounds, if you know?

A I can't say.

Q Now, Captain, was there a particular reason why at number four and number five hatches there were four containers; in other words, if I understand you correctly, at the forward hatches they were all split evenly, equal number on each side. When you came back to four and five you had eight containers on the port side of four, eight containers on the port side of five; is that correct?

A That's correct.

Q And you had four on the starboard side at four, and four on the starboard side at five?

A That's correct.

Q Is there some particular reason why these containers

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were stowed in that fashion; in other words at four and five hatches, you had more containers on the port side than you had on the starboard side?

A The reason we did that was because of the crew's quarters is situated back aft and they need a safe walkway between the midships and the quarters.

Q And was it necessary on the Concordia Viking for crew members standing watch on the bridge to go from their quarters aft on occasions both day and night forward to the ship's house?

A Yes.

Q This was designed to give them a walkway; is that correct?

A That is correct.

Q Now, when these containers were secured by the crew after the ship sailed or the day she sailed from Damman, Saudi Arabia, how were the lower containers? Consider this a stowage of four containers. How did you secure the lower container?

A We chocked between the hatch coaming and the containers with wood, and the same we did from the rail to the containers -- between the rail and the containers on the outside.

Q First of all, let me ask you, did you put dunnage

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under these containers before you put them on deck?

A Yes, we did.

Q And was this a solid floor of dunnage or was this dunnage stripping?

A It was stripping, one piece in each end.

Q And was this placed under the container itself, under the corner castings? Where was it placed?

A Under the corner castings.

Q After you loaded these containers on dunnage, you said you put chocking?

A Yes.

Q Between the hatch coaming -- would you consider this the hatch coaming over here, Captain (indicating)?

A Yes.

Q You put chocking between the bottom of this container and the hatch coaming; is that right?

A That's right.

Q And you also put chocking -- when I say you I'm referring now to your ship's crew -- you also put chocking as these containers were loaded between the bottom of this container and the ship's bulwark or the ship's rail over here; is that right?

A That's right.

Q Is that what you did?

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A Yes.

Q Now, could you tell me, Captain, what did you do, if anything, with respect to wire lashings? Where were they put, if you consider this a typical four-stowage block with containers? In other words --

A We had wire lashings from the outer corner of the upper container --

Q That is the outer corner here (indicating)?

A Yes.

Q To where?

A To the inshore.

Q Down this way (indicating)?

A Down that way, yes. From the inshore upper container to the right.

Q Down this way (indicating)?

A Yes.

Q And what size wire was this, do you recall?

A Three-quarter of an inch.

Q And how was this wire secured to this upper or these upper points?

A It was -- we put them through the hole in the containers, in the castings.

Q The corner castings?

A Yes.

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THE COURT: Loop?

THE WITNESS: Yes.

Q When you put the loop through the hole in the container castings, what did you do with the ends of the wire?

A We put them together with clips, wire clips.

Q Is that the type of wire clips as shown on Plaintiff's Exhibit 14?

A Yes, that's right.

Q And how many wire clips, if you recall, did you use to secure the wire into the end?

A Four wire clips.

Q And did you secure the wire by means of these wire clips to a turn buckle?

A The wire went through the turn buckle, one end of it.

Q Was it the same size turn buckle, as near as you can estimate, as this turn buckle?

A Yes.

Q Is that roughly a one by eighteen turn buckle?

A Yes, roughly.

Q And this was roughly the size?

A Yes.

Q Can you see it?

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A Yes.

Q I am referring to the turn buckle which is part of Plaintiff's Exhibit 14.

A Yes. That's exactly the kind we are using.

Q And how did you secure the turn buckle to the deck or to wherever it was secured?

A There is a bolt in the end of the turn buckle.

Q The shackle?

A Not shackle. That doesn't belong to the turn buckle.

Q Was it this type of an arrangement, a shackle?

A But the bolt can be released from the turn buckle.

Q Like this?

A No. That's the shackle.

Q I'm sorry. It wasn't a shackle?

A No, there was no shackle.

Q You secured it with a bolt?

A Yes, with a bolt which is in the turn buckle.

Q This (indicating)?

A Yes.

Q I see. And what did you secure the bolt to?

A To a pad eye in the deck.

Q Where on the deck did you secure these turn buckles?

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A To the pad eyes.

Q And where were the pad eyes located? At certain locations or certain fixed locations or were they distributed around the deck? Where were theylocated?

A They were along the hatch coamings and along the ship's rail.

Q They ran along -- some length at least ran along the hatch coaming?

A Yes.

Q And some along the ship's rail; is that your testimony?

A That's correct.

Q Now, Captain, will you consider these four boxes here to represent containers two high, four stacks of two high; do you understand what I am saying?

A Yes.

Q Now, did you put lashings only at the ends of these four containers? How did you do that?

A We did not.

THE COURT: May I make a suggestion? I'm a little worried about having everything on the blackboard. It is not going to be a very permanent record.

MR. FRIEDMAN: We can take a photograph and it becomes a record on the record.

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THE COURT: Who is going to take the photograph?

MR. FRIEDMAN: One of us will arrange it.

MR. KAIN: Before we are through I think we will have others. I don't have any objection to counsel photographing this.

Q Do you understand my question, Captain? I want to know if you put lashings at only the two ends or did you put lashings at this end? In other words, did you do it for every four containers in a block as shown here, or did you do it for every eight containers? By that I mean did you put lashings on both ends of four containers or did you put lashings on both ends of eight containers? I am referring to these cross lashings.

A We had lashings on both ends of four containers.

Q So that in a stowage of four of eight containers -- I'm sorry, four of two containers, you would have had lashings at this end, lashings in between here and lashings here; is that correct (indicating)?

A We would have one lashing in the after end and a double lashing in between.

Q That's at the end of this one and one at the front of this one (indicating)?

A Yes. Then one in the front of the other.

Q A total of four lashings?

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A Yes.

Q Now, when you loaded these containers and put this dunnage on the deck, did you build up this dunnage in any way for any reason?

A No.

Q You just put a strip of dunnage?

A That's right.

Q And when you finished loading four of these what, if anything, resulted from the camber or the curve -- do you know what I mean by the camber of the deck? I don't know the Norwegian word for it, but do you know what I mean by the camber, Captain?

A Yes.

Q Did the camber of your deck, that is the angle from the center line going offshore on either side -- my drawing is exaggerated but you know what I am referring to at least?

A Yes.

Q Did the fact that you had one piece of dunnage or one thickness of dunnage under this, did this cause or was there any effect on these upper containers?

A No, I wouldn't say so.

Q Well, what, if anything, did you do before you tightened down these lashings?

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A If there were any openings between the containers we throw pieces of wood in between them.

Q And did you do that before or after you took up on these turn buckles?

A Before.

Q Before?

A Yes.

Q Before you tightened up, after you put the turn buckles on you put the dunnage, if necessary, in between?

A If necessary, yes.

Q Now, Captain, if I recall correctly, you told me yesterday that your log book indicated you sailed from -- what is that, Damman, Saudi Arabia?

A That's right, Damman.

Q On the 29th of May, is that correct, at four something in the morning?

THE COURT: May 29th, 4:08 a.m.

Q And after you sailed you told us that sometime around 5:00 p.m. that day your crew had finished securing all of these containers for sea; is that correct?

A That is correct.

Q Now, after you sailed from Damman, while the ship was at sea, were any inspections made by anybody aboard the ship of the stowage of these containers which you were

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carrying as deck cargo?

A I didn't get your question.

Q After you sailed from Damman and before you arrived in Hoboken -- incidentally, was Damman your last port of call before Hoboken?

A No. We had several ports between.

Q Well, during the entire period -- let me ask you this: what was your next port of call after Damman?

A Bombay, India.

Q And will you look at your log book and tell me whether cargo was loaded aboard the Concordia Viking or discharged from the Concordia Viking while the ship was in Bombay?

A Yes. We were loading cargo.

Q What hatches did you work, Captain?

A We worked all hatches.

Q And what side of the ship was to the pier?

A Starboard side.

Q Starboard side to?

A Yes.

Q Now, before you could load cargo aboard the Concordia Viking at Bombay, was it necessary for you to do anything with the containers stowed on deck?

A Yes. We had to discharge top containers.

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Q And why did you have to discharge the top containers, Captain?

A Because it was difficult to bring the other cargo across two high containers.

Q Are you familiar, Captain, and again I don't know if there is a Norwegian word for it, but are you familiar with the term high lining? Do you know what the English term high lining means? I am referring now to stevedoring operations.

A Yes.

Q And is that the reason that these top containers were taken off, Captain?

A Yes, it is.

Q And just briefly, Captain, high lining, where you are using Burton falls with a single hook, you try to avoid increasing this internal runner angle, this angle between, say, the up and down fall and the Burton fall, the one over the pier and the one over the ship's hatch; you try to avoid bringing this anywhere up close to 180 degrees as the internal runner angle; isn't that so?

A That is so.

Q And the higher you raise this cargo hook, the higher you bring it up, the more you open out this internal runner angle; isn't that so?

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A That is right.

Q Now, Captain, after you put these top containers on board, did you have to put them back -- I'm sorry, ashore. Did you have to put them back on board and resecure them before you sailed from Bombay?

A Yes.

Q Now, what was your next port of call after Bombay?

A Cochin, India.

Q That is Indochina?

A No, it is India.

Q And did you load or discharge cargo from the Concordia Viking at Cochin?

A Yes, we did.

Q What hatches did you work at Cochin?

A We were working in all hatches.

Q And what side of the ship was to the pier?

A Port side to.

Q Port side. Now, did you, again loading hatches, the ship's hatches at Cochin, have to do anything with the containers on the port side of the ship?

A Yes, we did exactly the same as in Bombay.

Q You took off the upper containers or at least some upper containers so you could work the hatches?

A Yes, that's right.

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Q And before you sailed you had to put them back on and resecure them; is that correct?

A That's correct.

Q Now, what was your next port of call after Cochin?

THE COURT: May I interrupt you?

In Bombay I take it you just discharged the top containers on the starboard side; right?

THE WITNESS: That's right.

THE COURT: All right, go ahead.

MR. FRIEDMAN: I'm sorry, your Honor, did I understand they were then put back? Discharged and reloaded?

THE COURT: Right.

MR. FRIEDMAN: Thank you.

Q Where did the ship go after Cochin, Captain?

A It went from Cochin to Majunga.

Q Did you load or discharge cargo at Majunga?

A We loaded cargo there.

Q What hatches did you load, Captain?

A We loaded only number one hatch.

Q Number one hatch.

What side of the ship was to the pier at Majunga?

A Pardon me?

Q What side of the ship to the pier in Majunga or

was there any side?

A We were at anchor.

Q And what type of cargo did you load at Majunga in hatch number one?

A Frozen cargo, like shrimps.

Q Frozen shrimps?

A Yes.

Q And what did you use to load the frozen shrimps?

A We used nets.

Q Now, you didn't go alongside the pier at Majunga, did you?

A No.

Q You loaded from what, barges, lighters, boats, which came alongside?

A From shrimp trawlers.

Q Shrimp trawlers?

A Yes.

Q And did you remove or do anything with the containers at number one while the ship was at Majunga?

A No.

Q Did you do anything with the cargo nets you used to load at Majunga to take care of this high lining that we were just talking about?

A Yes. We had to shorten it up as much as possible.

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Q That is, you shortened the drift or the length of the net?

A The length of the net.

Q Now, where did the ship go after she was or after she called at Majunga?

A She went to New York.

Q Will you tell me what day the Concordia Viking sailed from Majunga?

A She sailed June 19th.

Q And what day did she arrive in New York, Captain? I'm referring now to the port of New York, not necessarily pier B.

A She arrived on July 10, 1971.

Q That's almost a month later; is that correct?

A Almost, yes.

Q And did you come to New York by way of the Cape of Good Hope?

A That's right.

Q Did you stop at any intervening ports between Majunga and the port of New York for the taking on of supplies?

A We stopped for two hours at Cape Town for mail and provisions.

Q Did you go alongside the pier to take on this

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mail and provisions?

A No.

Q Were they brought out to the ship?

A Brought out to the ship by a launch.

Q And, Captain, roughly how far or how great a distance did you travel in sailing from Majunga to New York by way of the Cape of Good Hope? I know you didn't measure it. I am just asking you to give me a rough estimate. Was it 5000 miles, 10,000 miles?

A Some place between three and four thousand, I suppose.

Q Three and four thousand miles, Captain, almost a month. What is your cruising speed on the Concordia Viking?

A Eighteen knots.

Q And a nautical mile is somewhat more than a land mile; is that right, some 6,080 feet? Maybe that's not a fair question to a Norwegian. You don't call them miles, do you?

A 1852 meters.

Q And even allowing for tides and currents and wind, if you have an average cruising speed of eighteen knots, that means you are making turns or engine revolutions for eighteen knots over the ground; isn't that so?

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A That is so.

Q Per hour?

A Per hour.

Q And doing this 24 hours a day for almost a month, wouldn't that come to more than three or four thousand miles?

A Then I have to work it out. If you want exact answers.

Q Anyway, it is a considerable distance which you traveled; is that correct?

A Yes.

Q Now, Captain, after you loaded these containers on deck at Damman and saild from Damman towards New York, stopping at these various ports enroute, were any inspections made of the stowage of these containers on the ship, on the deck of your ship by anybody aboard the ship; that is, any officers or any crew members?

THE COURT: May I have the last question, please?

(Question read)

A Yes, there was inspections done during the voyage.

Q And would you tell me by whom these inspections were made?

A Either by the carpenter, ship's carpenter or by me.

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Q And who was the ship's carpenter's immediate superior? Who did he work for aboard the ship? Who was his boss?

A The chief officer is the carpenter's boss.

Q You were the chief officer, weren't you?

A That's right.

Q And did the carpenter have any orders from you with respect to inspecting or checking the stowage and the securing of these containers during the voyage?

A That's right.

Q And what orders did you give him? Did you give any orders, for example, as to how often he was to make this inspection?

A No, not certain. But I told him to check them every now and then. We didn't have any routine on it. And if he found any slack or anything, he was supposed to tighten them up.

Q When you say tighten up, you mean take up the slack in the turn buckles?

A That's right.

Q Did you, yourself, make any inspection of this deck cargo of containers?

A Yes, I did.

Q And if you recall, Captain, were any -- at any time

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during this voyage were any entries made in your log book indicating that something was done to tighten up on these lashings or to further secure the stowage containers?

A Yes. Like the 22nd of June, "All lashings of deck cargo inspected and tightened."

Q And is there a time given for that?

A No, no.

Q If you know, were there any other notations made in the log book that the ship's crew tightened or resecured the lashings?

A No, there is no more entries.

Q Now, Captain, as you go through your log book there, as you look through it, can you give us a general description of the weather which this ship encountered on route from Majunga, or, if you will, from Damman, to the port of New York? Was it generally good weather, was it generally bad weather?

A It was generally good weather, with a few days in between, with a force up to eight.

Q That's force eight on the Beaufort scale you are referring to?

A Yes, that's right.

Q That's the wind scale that indicates the velocity of the wind?

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A Yes.

Q And on Norwegian ships do they also have a Sea scale?

A Sea scale, yes, which we had up to seven.

Q Does the front of your log book contain a table as to what force eight is on the Beaufort scale?

A Seven -- yes. Six to nine meters.

Q Are we referring now to the Sea scale or the Beaufort scale?

A The Sea scale.

Q Six to nine meters, and that means wave heights?

A Wave heights, yes.

Q And a meter is roughly somewhere around 39 inches, isn't it, Captain?

A Yes. Approximately three feet.

Q Is it somewhere around 39 inches, if you know?

A Yes. Approximately three feet.

Q And how about the Beaufort scale, is that shown on the front of your log book?

A Yes.

Q And is there a description next to force eight on the Beaufort scale?

A From the scale, eight, there is 34 to 40 knots an hour.

Q That's wind velocity you are referring to?

A Yes.

Q 35 to 40 knots an hour?

A Yes.

Q Any other description?

A No, no.

Q All right, sir. Now, you told us just a minute ago after you referred to your log book that the Concordia Viking had arrived in the port of New York on July 10, 1971, is that correct, sir?

A That is correct.

Q And what time of day did she arrive at the port of New York

A She arrived -- anchored at Graves End Bay at 11:06 p.m.

Q That's in the evening?

A 2300, yes.

Q And how long does your log book indicate the Concordia Viking remained anchored in Graves End Bay?

A She remained from eleven o'clock, the 10th, till 6:52 the following morning, the 11th of July.

Q The 11th of July. And what day of the week, Captain, was the 11th of July, according to your log book?

A Sunday.

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Q And when she raised anchor or hoisted anchor, where did the Concordia Viking go from Graves End Bay?

A She went to pier B, Hoboken.

Q And what time was the Concordia Viking alongside pier B, Hoboken, finished with her engines according to your log book?

A At 0832 in the morning.

Q That's 8:32 in the morning?

A That's right.

Q And she was alongside finished with her engines, her mooring lines are out and she is secured to the pier; is that right?

A That's right.

THE COURT: That's the 11th of July; right?

THE WITNESS: Correct.

Q Is Sunday in the Norwegian Merchant Marine, in port, is that a normal working day?

A No.

Q If your crew worked on Sunday, are they paid overtime under Norwegian articles?

A Yes, 100 percent.

Q Double pay?

A Yes.

Q Did your deck crew on the Concordia Viking do any

work on deck on July 11, 1971?

A They worked till twelve o'clock making ready for discharging.

Q And that's from when to twelve o'clock? When did they start?

A They started as soon as we finished the docking operation.

Q And they worked from then until twelve o'clock noon making ready for discharge; is that correct?

A Correct.

Q And would you tell me what your crew did in making ready for discharge?

A They were relashing the containers; the deck cargo --

THE COURT: They were what?

THE WITNESS: Relashing them. They were lifting the derricks.

Q Anything else?

A No.

Q Now, you say relashing?

A Yes.

Q What do you mean by relashing?

A They were taking off the lashings of the deck cargo.

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MR. FRIEDMAN: May we agree that he meant unlashing?

MR. KAIN: I am about to ask him.

Q When you say relashing I take it you meant they removed these wires and turn buckles you were referring to?

A That's what I meant, yes.

Q Now, in taking these lashings off of these containers, Captain, were all, if you know, were all of the turn buckles removed by your ship's crew?

A Not that day.

Q Not at that day?

A No.

Q Were some of the turn buckles removed by the crew?

A Probably some, yes.

Q And if the turn buckles were removed that meant you had to -- the wire wasn't secured to anything any more; is that right?

A Yes.

Q What did your crew do with these turn buckles when they took them off from these container housings, what was done with them?

A They gathered them on deck.

Q Where did they put them? Did you have a regular place to put them on the ship or did you just leave them on

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deck? What did you do with them?

A The next day when the deck was clear, we put them together in a box.

Q In a box?

A Yes, in a steel box.

Q And where was that kept?

A In the forward end of number one hatch.

Q And was there anything in this box or was it just a box?

A Oil.

Q And was this because these turn buckles were being used for lashings of cargo?

A That's correct.

Q Now, how about the wire lashings, when these were taken off what did your crew do with them?

A They left them on deck, and the following day they were taking them together.

Q And were these also saved and kept by the crew, these wire lashings?

A Yes.

Q And were these stored -- where were they stored, in the boatswain's locker?

A No, stored on deck.

THE COURT: Are we talking about two different things?

You say turn buckles and wire lashings, are they different?

MR. KAIN: When I say the lashing, your Honor, I'm referring to the wire that's affixed to the turn buckle in Plaintiff's Exhibit 14.

THE COURT: It isn't clear to me. On Sunday you said that some turn buckles were probably removed; right?

THE WITNESS: They are brought to the place where we used to keep them.

THE COURT: I tell you, you go over it again for us. What was done on Sunday?

THE WITNESS: On Sunday they removed all the lashings off the deck cargo, that means wire and turn buckles as well.

THE COURT: When you say removed, exactly what does that mean?

THE WITNESS: That means we took them away from the cargo.

THE COURT: Took them off the corner castings, took them off the pad eyes?

THE WITNESS: That's correct.

THE COURT: Was this done with all of the lashings or just some of them?

THE WITNESS: All of them.

THE COURT: Now that means that you had a bunch

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of things that consisted of wire rope attached to turn buckles; right?

THE WITNESS: They were not attached any longer.

THE COURT: Well, that's what I wanted to get at. Were the wires pulled apart from the turn buckles in this process?

THE WITNESS: Yes, they were. The clips was opened.

THE COURT: Well, on the clips being opened, would that release that loop from the corner casting?

THE WITNESS: Yes.

THE COURT: I take it then the wire is attached to the turn buckle when it is in place; right?

THE WITNESS: Yes.

THE COURT: How is it attached to the turn buckle?

THE WITNESS: Through the end of it.

THE COURT: Are you saying that on Sunday the wires were taken off the turn buckles?

THE WITNESS: Yes.

THE COURT: And what was done then? We have the wires, turn buckles all pulled off the containers and the wires separated from the turn buckles. What was done then on Sunday?

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THE WITNESS: That's what they did on Sunday.

THE COURT: Where did they leave them?

THE WITNESS: Around on deck.

THE COURT: Then when were they removed from being around on deck?

THE WITNESS: As soon as the deck was cleared the next day.

THE COURT: Cleared of what?

THE WITNESS: Deck cargo, containers.

THE COURT: In other words, they were left on deck, wires and turn buckles, until after the containers had been lifted off the deck?

THE WITNESS: That is correct.

THE COURT: I'm sorry, Mr Kain.

MR. KAIN: That's all right, sir.

Q Now, Captain, when these wires -- in other words, when you opened up these wire clips, these four wire clips that you told us were put on each one of these lashings and you had, after you opened up this wire clip, before you touched the wire lashing, you had the wire running through the corner casting; is that right?

A That is correct.

Q Now, if you know, Captain, could all of these wire lashings be removed from these corner castings or were

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there some of them left, were there none of them left?

A I can't say if there was any left.

Q Based on your experience, do these wires sometimes kink in the corner castings?

A Yes.

THE COURT: What?

MR. KAIN: Kink, k-i-n-k.

Q Do you know what I mean by the term "kink"?

A Yes, I do.

Q Is it always possible, Captain, if you know, for your crew to remove wire lashings in between stowages of containers? I'm referring to this section here between the after part of this one and the forward part of that one (indicating). Is that always possible for the crew to reach those lashings after they are cut loose?

A No.

Q Did you make any inspection after these turn buckles and lashings were removed by your crew to see whether there were any lashings still in place in these containers?

Q You told us that your crew did something with the ship's booms also on Sunday. What was that?

A They raised the booms.

Q When you say raised them, you mean they topped them up from the horizontal position in which the ship carried

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them?

A Yes, that's right.

Q Incidentally, will you look at Defendant's Exhibit C in evidence, which is a general arrangement plan of the Concordia Viking, and will you tell me -- I am talking now about the booms at number five hatch. When your booms were secured for sea, were they collared up against your king posts or were they horizontal down the boom rest?

A They were down in the boom rest.

Q Before the longshoremen came on board, that is Sunday, the day before the longshoremen came on board, your crew raised these booms up?

A That is correct.

Q And what did you do with them? Did you just cross them into the hatch, secure them to the hatch?

A We just raised them and left them.

Q You didn't spot them at any particular position?

A No.

Q During the discharge on July 12th, that is the Monday, were the ship's starboard booms used in the discharge?

A No. It was used house fall.

Q And that's a block up on the ship of the pier?

A Yes.

Q Was this house fall, by that I mean the rigging of the house fall, the wire from the starboard boom through

your heel block and up to the block on the pier in back of the ship, was that rigged by the longshoremen or by the ship's crew?

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A By the longshoremen.

Q And was that done on Monday or was that done on Sunday, the 11th, if you know?

A On Monday.

Q Now, Captain, when your crew made ready for discharge a period of time on Sunday, that meant they had to be paid double wages while they were doing that work?

A Yes.

Q Now, when you came in to Hoboken alongside pier B on the morning of July 11th, did you break sea watches at that time?

A Yes, at twelve o'clock.

Q At twelve o'clock?

A Yes.

Q And would you tell his Honor and the ladies and gentlemen of the jury what you mean by breaking sea watches?

A From then on, from twelve o'clock, we are working ordinary working day hours, like from seven o'clock in the morning until five o'clock in the evening.

Q That is opposed to the hours you work at sea, which you are four on and eight off; is that correct?

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A Yes.

Q I am referring now to the ship's officers.

A Yes.

Q Would you tell me, Captain, looking at your log book, if necessary, when your crew turned to or went to work on the morning of July 12, 1971, that is the following Monday morning?

A They started at seven o'clock in the morning.

Q How many men did you have in your deck department on the Concordia Viking, do you recall?

A Eight.

Q Captain, will you look at this crew list of the Concordia Viking, which is Plaintiff's Exhibit 4 in evidence, and will you tell me the ratings and the number of each of the unlicensed seamen who comprised your deck department on the Concordia Viking?

A We had the boatswain, a carpenter, three ablebodied seamen, one ordinary seaman, one youngman and one apprentice.

THE COURT: What was after ordinary?

THE WITNESS: Youngman.

MR. KAIN: I don't know what the English equivalent is but I think it is literally translated as young man.

THE COURT: I see. And one apprentice?

THE WITNESS: One apprentice.

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Q Now, the members of your deck department, that is the unlicensed members of your deck department, and I'm not referring to ship's officers, who was their immediate boss or who was their foreman?

A The boatswain is their foreman.

Q The men get their orders in the deck department from the ship's boatswain?

A That's correct.

Q And does the ship's boatswain stand a watch or is he a day man? Does he stand a watch at sea or does he work during the day?

A He is a day man.

Q And who is the boss or the superior of the ship's boatswain?

A I didn't get your question.

Q Who is the boatswain's boss? Who does the boatswain work for on the Concordia Viking?

A The chief officer.

Q In this instance that's yourself; is that correct?

A That's correct.

Q Now, on July 12th when your crew turned to at seven o'clock or when they were called at seven o'clock, what did they do? I don't mean precisely, but what type of work did they do? Did they work on deck?

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A Yes.

Q Did they polish brass or what did they do?

A No. They were doing different deck work. That's what the log says here. That means a lot of small jobs which have to be done when a ship is alongside. Like taking aboard provisions and spare parts, and so on.

Q Now, before your crew turned to at seven o'clock, and I'm referring now to July 12, '71, did they have breakfast?

A No.

Q Would you tell me, if you recall, when on July 12, 1971, when was the crew's breakfast hour?

A The routine on the ship was they had breakfast from 8:30 to nine o'clock.

Q And when you say breakfast from 8:30 to 9:30, that means --

A To nine.

Q That's when it was available to the crew in the crew mess; is that correct?

A That's correct.

Q That doesn't mean they all necessarily took a half hour to have their breakfast; is that right?

A That's right.

Q They were free from work in that period?

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A Yes.

Q And food was available to them in the crew mess at that time?

A Yes.

Q Now, how about the ship's officers, when do they have breakfast?

A The same time.

Q And do they turn to the same time in the morning?

A That's correct.

Q Now, did there come a time, Captain, on July 12, 1971, and you may refer to your log book if you wish, when you were informed of an accident involving a longshoreman at number five hatch of the Concordia Viking?

A Yes, that's correct, I was informed.

Q And what time approximately was this accident called to your attention?

A Approximately nine o'clock or 8:55.

Q And do you recall where you were at the time this accident was reported to you or you were told about this accident?

A Where I was?

Q Yes, where were you? Were you on the ship when you were told about it?

A Yes. I was inside.

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Q And where were you on the ship when you were told about it?

A I was at breakfast.

Q At breakfast?

A Yes.

Q And where is that, Captain? Where were you at breakfast? What part of the ship did you have breakfast in?

A In the ship's salon.

Q Is that in this midship house we have been referring to?

A In the midship house on the second deck.

Q And do you remember who told you about this accident?

A No.

Q Do you remember whether it was ship's personnel or somebody who was not ship's personnel?

A It was ship's personnel.

Q Do you remember whether it was a nonlicensed member of the ship's crew or an officer of the ship's crew?

A I don't know.

Q And when this accident was reported to you, what, if anything, did you do?

A I went straight out on deck.

Q And when you went out on deck, you mean you went

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up from this midship house to the open deck?

A Yes.

Q At which side of the ship did you come out onto the deck?

A I had to come out on the starboard side.

Q And when you came out on the starboard side, where did you go?

A I went aft to hatch number five where the accident had happened.

Q And as you went aft on the starboard side -- is that where you went aft, to hatch number five?

A Yes.

Q You had to pass by hatch number four; is that correct?

A That is correct.

Q Were there containers still on deck at hatch number four when you went past?

A Yes, that is also correct. There were containers left on deck.

Q Did you count these containers or do you have any present recollection as to how many of these containers were on deck at hatch number four?

A No, I have no recollection of it. I didn't stop to count them.

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Q Now, when you got back to hatch number five, were there containers on deck at hatch number five?

A Yes, there was.

Q If you recall, were there containers on the inshore side of the hatch number five at that time, that is the starboard side?

A There was containers as well on the inshore as on the offshore.

Q Did you take any notice of or make any count or do you have any present recollection as to how many containers were on the starboard side of number five hatch?

A No.

Q When you got back to number five hatch, what did you do?

A I looked over the place where I was told the accident had happened.

Q Where were you told the accident had happened?

A From the offshore side of number five hatch.

Q That's the port side, the offshore side?

A Yes, that is correct.

Q And when you say you looked over the place where you were told the accident happened, that is the offshore side, did you go over to the offshore side?

A Yes, I did.

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Q And how did you get to the offshore side?

A By the top of the hatch covers.

Q You climbed up onto the hatch square?

A Yes.

Q That's up on this portion (indicating on blackboard)?

A Yes.

Q I take it at that time number five hatch was closed; is that right?

A Yes, it was.

Q Now, when you got up onto the top of this number five hatch square, up on the hatch cover of number five, how many containers were offshore on the number five hatch, doyou recall?

A Seven containers.

Q And looking, if you will, Captain, and consider these four squares here to be four stacks, two containers high, and this to be number five hatch, I take it it was one of these top containers that was missing; is that correct?

A The aft inshore top container.

Q The one that bears the four and eight on the legend; is that correct?

A That is correct.

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Q How about the other seven containers, were they still in place?

A They were all in proper position.

Q Were they all one atop the other as depicted here on these --

A Yes, they were as they had been during the voyage.

Q Was any one of these containers turned around in any way?

A No.

Q Did you look to see whether there was any damage to any of these containers?

A There was no damage whatsoever.

Q When you got back to number five where was this container that had formerly been at the inshore portion of the after container on the inshore side? Where was that upper container, do you know?

A It was taken ashore.

Q It wasn't at number five hatch?

A No, it was taken ashore.

Q Do you remember where the cargo hook was at that time? Was it ashore with the container, was it on the ship? Do you have any recollection of where it was?

A No.

Q When you got back to number five hatch, did you

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see -- incidentally, when you got this report of this accident, what were you told?

A I was told that one of the longshoremen had fell overboard from atop of the container at number five.

Q And when you got back to number five hatch, did you see this longshoreman in the water?

A No.

Q Now, after you looked at these containers, what did you do? I say after you went back aft, looked at the containers, what did you do?

A I tried to find somebody who had witnessed the accident.

Q Did you ever see the longshoreman who had been in the water?

A Yes, I saw him up on the pier.

Q Where did you see him up on the pier?

A He was walking off the pier.

Q Were you on the pier when you saw him?

A Yes, I was.

Q And were you close to him? Was he a distance away from him?

A I was a distance away from him.

Q And was there some reason that you recognized this individual as the longshoreman who had fallen in the water?

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A Nothing else than I just saw a wet man.

Q A wet man. Could you recognize him from where you saw him?

A No.

Q And when you saw this wet man what was he doing?

A He was walking off the pier.

Q Was there anybody with him at the time?

A Yes, a couple of others.

Q A couple of other individuals with him?

A Longshoremen, yes.

Q Now, after this accident did you make any investigation or make any inquiry among -- let's take first your ship's crew -- as to how the accident happened and the reason for the accident?

MR. FRIEDMAN: I object to this line.

THE COURT: We will take our morning recess now. The jury can go out and I will talk to the lawyers a minute.

(Jury leaves)

THE COURT:What is the problem here?

MR. FRIEDMAN: I assume that this question is the first of a sequence to elicit from the first mate what he was told by others as to how the accident occurred. That, of course, is plainly inadmissible.

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I have said to the Court, and I in no way renege, even though it did not come up during the oral discussion on the record as to the admissibility of the McGrath report of the accident, that if the shipping company wished to tender the log entry as such as their record of what occurred, that I would not object. Whether or not I had grounds I would not.

THE COURT: That was in your brief.

MR. FRIEDMAN: That was. That was by no means --

THE COURT: Let's just have it from Mr. Kain. What do you propose? If you are worried about a foundation for the log book, that objection is withdrawn.

MR. KAIN: I think, your Honor, in view of your Honor's admission of the reports of McGrath's safety man and other people which are obviously hearsay, and I understood your Honor to rule that under the new rules of evidence I thought your Honor distinctly said to us in chambers yesterday or in the robing room that it wasn't being admitted as an admission against interest on the part of the defendant, shipowner --

THE COURT: You are familiar with the new rules?

MR. KAIN: I can't say I am that familiar. I have alluded to them. Let's say I haven't sat down and studied them.

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THE COURT: So we don't have any confusion, I admitted the McGrath reports, Exhibits 8 and 9, under Rule 803-6. And the full relevant text is, "The following are not excluded by the hearsay rule even though the declarant is available as a witness," and it lists certain things. And it lists under Item 6 "Records of regularly conducted activity."

Now, these were records. It does not follow from that that simply testimony of oral statements of other people get in. Maybe there are other exceptions that apply in the particular instance, but at least I was dealing with a record there.

MR. KAIN: If your Honor please, I propose to ask this witness did he make an investigation among his ship's crew and did he, on the basis of this, did he ascertain there were no eyewitnesses to it. He has entered this in the log book and he did make such an investigation and he did fail to uncover any eyewitnesses to this accident.

MR. FRIEDMAN: Maybe I'm not clear.

MR. KAIN: And secondly I propose to ask him did he inquire among the longshoremen, and he did do this, that is my understanding and that's what he told me, and I propose to ask him on the basis of what he was told by the longshoreman did he make a log book entry. He makes a log

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book entry, it is an entry made in the regular course of business, and unless it is made in a purely improper and wrong manner it has to be based -- he just doesn't pull it out of the air. If he does, he is doing something he is not supposed to do.

THE COURT: The log entry states, as I recall it --

MR. KAIN: I will get a translation, your Honor.

THE COURT: Yes.

(Pause)

MR. FRIEDMAN: Page 31, gentlemen, of the Captain's deposition, line 15.

MR. KAIN: This witness wasn't produced as a translation expert but there is a copy of his translation of it (handing). I presume that's roughly accurate.

MR. FRIEDMAN: Excuse me, it starts at line 9, your Honor.

THE COURT: Now, after the other discussion and the log entry there is the statement, "There were no eye-witnesses from the ship's crew, the ship's persons" --

MR. KAIN: Ship's crew, ship's persons is the captain in effect translating.

THE COURT: He is certainly entitled to tell what he meant. That's his log entry.

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MR. KAIN: He is probably translating ship's crew, ship's persons from the single Norwegian word.

THE COURT: What you are proposing, it's an important point. You are proposing to ask him whether he made any investigation and the extent of his interviewing, and so forth, and have him testify that he --

MR. KAIN: I propose to do it in two stages. First did he make any inquiry among his officers and crew as to whether any of them had witnessed this longshoreman's accident.

THE COURT: Right.

MR. KAIN: And did he get any response. In other words, what did the inquiry show? Clearly, he has told me as far as he knows there were no eyewitnesses and his inquiry included no eyewitnesses.

MR. FRIEDMAN: I have no objection to that for two reasons. One, I have agreed to the log entry being read which says that.

THE COURT: But it doesn't quite say that. What is meant by --

MR. FRIEDMAN: There were no eyewitnesses among the ship's crew at line 18. In any case, Judge, I think in fairness, I'm willing to be fair in the sense that I didn't intend to argue that the ship failed to produce as trial

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witnesses people that they knew to be eyewitnesses of the happening of the accident. And so I can assure Mr. Kain of that. If he wants to doubly protect himself I have no objection to him eliciting that the ship's officer attempted to learn whether there were any eyewitnesses from the ship's crew to the happening of the accident and was given to understand there were none. That way he is doubly protected against my arguing in summation he didn't bring in witnesses.

Beyond that I do not agree to the elicitation of hearsay concerning his investigation.

THE COURT: I take it one thing you want to do is to use this as some rebuttal or contradiction of Mr. Langan; is that right?

MR. KAIN: Not necessarily Mr. Langan. We have all of these reports that are made that clearly indicate this is what happened. There is no aspersion cast upon whoever these people were from McGrath who made these things. I am not attempting to do this but I have the mate sitting here. I submit to your Honor if I say to this mate, you didn't find any eyewitnesses? No. Among the ship's crew. Did you talk to the longshoreman. Objection. You can't answer it. Where any logical juror would obviously conclude where does he come off making a log book entry that this man

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lost his balance? Somebody to tell him this. He just testified he didn't see it and his log book entry says nobody from the crew saw it.

THE COURT: I'm not clear what you are getting at.

MR. KAIN: It is an improper procedure, it is wrong, it is undoubtedly illegal, although I am not familiar with Norwegian law, for a ship's officer to make a log book entry which he knows to be in error. In other words, no basis, nobody told him he didn't see it, dream it up out of the whole cloth. Now he has a log book entry, and I have a translation here which I will offer rather than that, which says, "During the discharge of containers from deck at number five one of the stevedores fell overboard. He was on top of two containers to make fast the lifting gear when he got off balance and fell over the side and into the water."

Now, if he didn't know it, because he wasn't there --

THE COURT: Please, can we just go slowly. You want to introduce that log entry, do you not?

MR. KAIN: Yes, sir.

THE COURT: And you want to argue from it about whatever it says about this accident, you want to use it?

MR. KAIN: I want to argue this was put in.

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THE COURT: And you want to argue that this helps to show the causes of the accident; right?

MR. KAIN: I just want to argue that this is in effect -- this was the intelligence that they got.

THE COURT: I'm confusing things by asking you too many questions, so I will try to limit my questions. You want to put the log entry in?

MR. KAIN: Yes, sir.

THE COURT: Now, I have heard you make a long explanation but I don't know the point you are getting at. You say under Norwegian law if the officer put in a log entry that was made up out of whole cloth or false it would be wrong. That's an obvious proposition.

MR. KAIN: All right, sir.

THE COURT: Now, are you saying that this log entry was wrong?

MR. KAIN: No, sir.

THE COURT: And that it should be rejected by the jury?

MR. KAIN: No, sir.

THE COURT: Are you saying that the log entry has a contradiction which may cause confusion?

MR. KAIN: No, sir.

THE COURT: What are you saying?

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MR. KAIN: I am trying to explain as best I can to your Honor that the log book contains an account, general though it may be, of what transpired at the time of this accident. If your Honor will look at it --

THE COURT: I see it. I have read it 50 times.

MR. KAIN: If it contains such an entry of what transpired and if the log book entry is made by the vessel's chief officer, as it was, by Captain Vangsnes, who admittedly did not see the accident itself and who says that I inquired among my officers and crew, none of whom saw this accident; the easiest thing to kick this thing in the head by anybody, to thoroughly discredit it, is to say that if he didn't see it and if nobody on the ship saw it, where does he get this account?

THE COURT: So where do we go from there?

MR. KAIN: I propose to ask the chief officer in addition to your ship's crew did you make inquiry as to the cause of the accident among the longshoremen. In other words, did he talk to any of the longshoremen. And on the basis of his conversation with these longshoremen did he make an entry in his log book. That has to be the basis of the entry in his log book, your Honor, unless it is a purely fictitious entry with no foundation at all.

THE COURT: I get you. I certainly think that Mr.

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Kain is entitled to show the way in which the log entry was developed. Let's suppose that you were not agreeing to its admissibility. Let's suppose we just came upon this afresh and he marked for identification the log entry, he marked the translation, and he started asking questions. He could certainly ask him a lot of foundational questions. He could ask him, did you make the entry? And the man would say yes. He could say, what was the source of the entry? In other words, he could ask all the questions which would be necessary to establish a foundation under Rule 803-6. And those questions in my view would include the very questions which Mr. Kain is now proposing to ask. They could be asked without an objection.

Of course, Mr. Friedman has consented to the admission of the log entry and in a sense short circuited those foundational questions but it doesn't make those foundational questions irrelevant if Mr. Kain wants to ask them.

I would suggest you get out, and I will lend you right now, Rule 803-6. You can certainly ask questions that you are entitled to ask to show those foundational items. That's really all you are doing.

MR. KAIN: I'm sure he doesn't know the names of the various longshoremen. I just want to ask him did he make inquiry among certain longshoremen or among the longshoremen

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on the basis of the information he got from these men and did he make a log book entry?

THE COURT: Is there any problem with that?

MR. FRIEDMAN: You have spoken on the subject. I do respect fully except to your Honor's ruling.

THE COURT: I have to take a short criminal matter in the robing room now.

MR. KAIN: May I note for the record my associate has referred me to 803 subdivision 6 which I think covers it.

(Recess)

DIRECT EXAMINATION CONTINUED

BY MR. KAIN:

Q Captain, following this report of accident that you got on July 12, 1971, did you make inquiry among your ship's officers and crew members as to whether any of them had witnessed this accident?

A I did, yes.

Q And did you also make inquiry among longshoremen working aboard the ship as to what had caused this accident or whether they had witnessed the accident?

A I did.

Q And, Captain, did you on the basis of the inquiry which you had made through your ship's officers and crew and to the longshoremen, did you thereafter make an entry in

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your log book concerning the incident?

A That's correct.

Q Will you look in your log book, Captain, which I believe is Defendant's Exhibit L in evidence, specifically to July 12, 1971, and tell me if there is a log book entry pertaining to this accident?

A Yes, there is.

Q And can you tell me b whom this log book entry was made?

A It was made by myself.

Q And it was made on the basis of the inquiry that you had made of your ship's officers and crew and to at least some of the longshoremen working aboard the ship; is that correct, sir?

A That is correct.

MR. KAIN: If your Honor please, rather than ask the captain to read it, I have a translation here which is for the entire day, as I understand it, of the log book, which I would like to offer in evidence, if there is no objection to it.

THE COURT: Let's have it marked.

xxx (Defendant's Exhibit N marked for identification.)

MR. FRIEDMAN: I have no objection to reading from this translation. I assume he has either prepared that

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translation or reviewed it and adopts it.

MR. KAIN: If your Honor please, it was prepared by the Norwegian in my office, a Norwegian attorney who is no longer there, I believe. But copies were supplied to opposing counsel and I understood there was no objection.

THE COURT: Unless there is any problem about the accuracy of the translation, we will receive it.

Do you have any problem about that, the accuracy of the translation?

MR. FRIEDMAN: There are a few differences from the time the captain -- this gentleman is the first mate, right?

THE COURT: Yes.

MR. FRIEDMAN: The captain was deposed, we read something from his deposition, and when he translated it on deposition August 1974, there are a few words that are different. There are differences. But I have no objection if the first officer wants, and he seems to speak English. He can read us his English translation of his Norwegian entry. It is as simple as that.

MR. KAIN: There are other entries, if your Honor please. I thought it would save time.

THE COURT: You object to this particular document going into evidence?

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MR. FRIEDMAN: Yes, your Honor.

THE COURT: Because of the lack of foundation on translation?

MR. FRIEDMAN: That's right.

THE COURT: Have you read this document that Mr. Kain has in his hand?

THE WITNESS: No.

MR. KAIN: I don't think he has ever seen it, your Honor.

MR. KAIN: May I mark it for identification and --

THE COURT: It is just a matter of time. I am sure you know enough English to translate from Norwegian, do you not?

THE WITNESS: I do but not perfectly.

MR. LEONARD: May I suggest that the witness be shown that document and if he adopts it, he adopts it.

MR. FRIEDMAN: He has been testifying all along with the log book, without objection, which is in front of him in Norwegian, all of those statements as to who was loading and unloading at different ports. We all saw it. He looks in the Norwegian log book and tells us in English what it says. I have no objection for him doing the same thing for July 12, 1971. I don't know why we are stumbling

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over it.

MR. KAIN: May I note for the record it's much easier for me to use it, and put it in evidence.

THE COURT: Right now we are minus the tiny step as to the accuracy of the translation. I hope it doesn't take a long time. We could have done it at a recess.

MR. KAIN: I didn't anticipate the objection, if your Honor please.

THE COURT: Can you look at that quickly and you see whether you can determine whether that is an accurate translation?

MR. KAIN: May I for the moment ask him for the log book entry to which I am alluding and then he can compare it and then may I read this rather than asking him to go through it?

THE COURT: Yes.

Q Compare this, if you can, this 0850 log book pertaining to accident, compare it to the entry and tell me if that is an accurate translation, to the best of your knowledge, of the Norwegian entry.

MR. FRIEDMAN: I object. Why doesn't he just --

THE COURT: Please, Mr. Friedman. We have had endless talk on this and it is a very simple thing.

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(Pause)

A Yes, it seems correct.

THE COURT: I will receive it.

xxx (Defendant's Exhibit N received in evidence.)

MR. KAIN: Your Honor, please, may I read to the jury the log book entry to which the captain refers?

THE COURT: Yes.

(Mr. Kain reads from Defendant's Exhibit N in evidence to the jury.)

THE COURT: All right.

Q Now, Captain, will you look at your log book for July 12, 1971, the day of this accident, and will you tell me, Captain, whether there are any entries in that log book for that date pertaining to the weather and the wind force?

A Yes.

Q And would you read me the entry pertaining to the wind force first?

A It was calm weather, clear sky.

Q And is there any entry pertaining to the weather and the sea?

A No. We never put sea entries in when we are in port.

Q Just calm weather, clear skies does it say?

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A Yes. And it was 27 degrees centigrade.

Q Captain, I don't know the Norwegian terms for it, but are you familiar with the English terms, and I'm referring now to shipboard terminology, do you know what is mean by a stiff ship and a tender ship?

A Yes, I do.

Q And could you tell me, Captain, in essence what is a tender ship, as you understand it.

A A tender ship is a ship which has an unsteady stability.

Q And how about a stiff ship?

A That is the opposite.

Q It is better stability, more stable?

A Yes.

Q And based on your experience on the ship that you have sailed, would you characterize the Concordia Viking, specifically on July 12, 1971, as a tender ship or a stiff ship?

A I'll say that she was a stiff ship, really stiff.

THE COURT: Read the answer, please.

(Answer read)

THE COURT: Speak up, Captain.

Q Captain, may I show you these two photographs which have been marked Defendant's Exhibits E and F for

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identification -- I'm sorry. I have one there I didn't mean to give you. Which are marked Defendant's D and E for identification. Will you look at those photographs, Captain, and will you tell me whether those photographs are a fair representation; that is, whether they fairly depict the condition of the deck on the port side at number five hatch of the M.S. Concordia Viking on July 12, 1971, after the empty containers had been discharged from that deck?

A Yes, I would say so.

MR. KAIN: I offer them in evidence, if your Honor please.

THE COURT: Any objection?

MR. FRIEDMAN: Yes, your Honor. I think we had better approach the side bar.

THE COURT: All right.

(At the side bar)

MR. FRIEDMAN: Your Honor will note from Exhibit N that they finished discharging for the day at 1645 in the afternoon. Your Honor will also recall the careful questions just placed to the witness to the effect that the photographs were taken after discharging had been completed.

MR. LEONARD: Of containers.

MR. KAIN: Empty containers.

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MR. FRIEDMAN: We also know that these photographs were shown to us during the course of pretrial discovery together with a memorandum that your Honor got from Mr. Heller from the investigators that have the name of Tradition Associates. They report they took three photographs, one showing the height of the ship, the side of it which Mr. Kain is withholding. They report that these three pictures were taken at the end of the day on which the accident occurred.

Now, your Honor is not unaware that to some extent there is perhaps significant to this case the so-called list, the slight angle one way of the vessel. The testimony has been that at 8:15, nine o'clock in the morning, and as the log book also confirms, all five hatches were in the course of discharging cargo to the inboard side. There has been certain testimony as to the possible effect on the list of the vessel of those procedures. We know those pictures were taken when this was not occurring. These pictures were taken as to the angle of the deck under conditions distinctly different.

That is a significant thing for the jury, which may create a tangible effect on the jury and it is improper.

THE COURT: I don't think so. It is very helpful in showing certain physical features which have been described

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repeatedly but never visible. The question that the jury knows at this moment, and many features which may have existed at the time of the accident, which are not in these pictures. But it is the best we have at the moment. I will overrule the objection.

MR. FRIEDMAN: May I ask, your Honor, what is your Honor going to do with respect to the --

THE COURT: We have talked long enough.

(In open court)

(Defendant's Exhibits D and E are received in evidence.)

xxx

(In open court)

THE COURT: These are a couple of pictures which the witness has testified represent a portion of the port side deck of the Concordia Viking after the containers had been discharged.

MR. KAIN: That's at number five hatch, your Honor.

THE COURT: At number five hatch. They represent that situation no more and no less. Obviously they do not contain the exact situation as it existed at the time of the accident. Mr. Friedman has objected to them on that ground. His contention it might mislead the jury to have these pictures. I don't think it will mislead you as long as you realize what

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is obvious: that there may have been, because of cargo operations, there may have been something of a list at the time of the accident, there may not have been. All I am suggesting to you is that you keep in mind the testimony as to the situation at the time of the accident. There may be conflicts in the evidence on that point. Maybe somebody testified there was a list. That is a matter for you to determine. I am not saying there was or was not a list. That is a question for you. But the only point I am making is you consider all the evidence that has been presented pro and con, the different points, as of the time of the accident. These pictures will help illustrate some of the physical features, the location, what the hatch coaming is, what the bulwark is, what a container looks like and the deck house. That is all that they are being introduced to show.

All right, Mr. Kain.

MR. FRIEDMAN: In view of your Honor's comments may I withdraw my objection placed on the record. May I ask one other thing? Mr. Kain indicates, and I will accept his representation, to the best of his knowledge in what period of the day of July 12, 1971, these photographs were taken, afternoon, late afternoon, and I will accept his representation.

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MR. KAIN: I can't fix the time exactly, your Honor. It is my belief they were taken the afternoon of the day of the accident. If your Honor will recall, I specifically asked Captain Vangsnes if it was a fair representation after the discharge of the empty containers from that hatch.

THE COURT: All right.

Q Look at Defendant's Exhibit F for identification and tell me if that is a photograph depicting at least a portion of the M.S. Concordia Viking as she existed on July 12, 1971.

A Yes, it is.

MR. KAIN: I offer it in evidence, if your Honor please.

THE COURT: Take a look at that, Mr. Friedman.

MR. FRIEDMAN: If it is the one I think it is, of the side of the ship, I have seen it before and I have no objection to it.

THE COURT: No objection to F, it is received.

xxx (Defendant's Exhibit F received in evidence.)

Q Captain, will you look at this photograph which is Defendant's Exhibit E in evidence and -- if your Honor please, may I inquire whether we have a red grease pencil or something like that?

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MR. FRIEDMAN: You may use my felt pen.

MR. KAIN: Is there a grease pencil?

THE CLERK: Here you are.

Q Will you look at that photograph, which is Defendant's Exhibit E in evidence, Captain, and may I first direct your attention specifically to the port hatch coaming for number five hatch. Do you see that in the picture there, Captain?

A I do.

Q And does that photograph at the end of the hatch coaming, does that show automatic hatch covers raised to open the hatch?

A Yes, that is right.

Q And would you put a K, if you can, Captain, between -- do you see a space between the upper part and what appears to be a supporting beam on the hatch cover? Will you indicate on there with a grease pencil with a K -- would you just write a K in where that cover is shown in the picture?

(Witness complies)

Q And again referring, Captain, to the same portion of that photograph, does it depict the hatch coaming itself at number five hatch?

A Yes.

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Q Would you put a C on the coaming, being careful, if you can, to avoid the stiffeners along the side of the coaming?

(Witness complies)

Q Does it also, Captain, show any pad eyes along the side of that coaming?

A Yes, it does.

Q Will you put an arrow on deck pointing to one of these pad eyes and put a P at the base of the arrow so it can be identified?

(Witness complies)

Q Is the container shown in that photograph, Defendant's Exhibit E in evidence --

A Part of it.

Q Sir?

A A part of it shows.

Q There is a part of a container. Is that container the container assigned to Houston that weighed five tons at that hatch?

A Yes.

Q And does that photograph depict any dunnage under that container?

A Yes.

Q Would you put a D where the dunnage is depicted?

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(Witness complies)

Q Would you put an R, Captain, over the offshore rail or bulwark?

A It doesn't show on the picture.

Q It isn't shown on the picture. Maybe I had better look at the picture again.

(Pause)

Q Will you look at this photograph, Captain, which is Defendant's Exhibit D in evidence, and will you tell me whether that photograph shows the bulwark or the offshore rail?

A Yes, it does.

Q Will you put an R above the offshore rail, and if you wish an arrow pointing down to the rail.

(Witness complies)

Q Now, Captain, does that photograph you have before you, Defendant's Exhibit D in evidence -- I know it is pretty dark but are you able to distinguish the stiffeners on the offshore rail or bulwark, the port rail or bulwark?

A Yes, I can.

Q Would you put an arrow pointing to one of those stiffeners and will you make it Y?

A Make it a what?

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Q A Y. Wait a minute, Captain, make it an S.

(Witness complies)

Q Will you also put an S on Defendant's Exhibit E in evidence where the stiffeners on the port hatch coaming are?

(Witness complies)

Q Captain, will you look at Defendant's Exhibit D in evidence, and I direct your attention specifically to the mast house between number four and number five hatches, a portion of which is depicted in a photograph, is it not?

A Yes.

Q Will you write an H somewhere on the mast house itself.

(Witness complies)

Q Would you look at Defendant's Exhibit E in evidence, this photograph, and will you tell me, Captain, is that photograph, anywhere in that photograph do you see the wire lashings on the deck?

A Wire lashings?

Q Yes. Near the after end of number five hatch coamings. I can't tell whether they are wire lashings or not. Is that evident to you?

A That is not a wire lashing.

Q Captain, will you look at Defendant's Exhibit D in

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evidence and will you tell me, Captain, whether that photograph -- does that photograph show a working and preventer guy for the ship's boom?

A Yes.

Q Will you put an arrow towards the working guy and the preventer guy and will you put a G at the end of the arrow.

(Witness complies)

MR. KAIN: Does your Honor wish to see them?

THE COURT: Are you going to show them to the jury?

MR. KAIN: I intended to after I have shown them to your Honor.

THE COURT: Thank you.

(Pause)

MR. KAIN: May I show them to the jury, your Honor?

THE COURT: Yes.

MR. FRIEDMAN: May I see them, Mr. Kain?

MR. KAIN: I thought you have seen them all.

THE COURT: These are looking aft, I take it?

THE WITNESS: Looking aft.

(Pause)

THE COURT: We will recess until 2:15.

MR. KAIN: May I just inform your Honor that I

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expect to commence with a doctor at 2:15, so I would interrupt briefly Mr. Langan's testimony?

THE COURT: Yes.

(Luncheon Recess)

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rd/lf/548

ANTON PICINICH

vs.

CHRISTIAN HAALAND & BOISE-GRIFFIN
STEAMSHIP COMPANY, INC.

---------- 71 Civ. 5357

SKIBS A/S SAMUEL BAKKE

vs.

JOHN W. MC GRATH CORPORATION

October 16, 1975

(In open court - jury present)

THE COURT: Resume the cross examination of Captain Vangsnes.

E D W I N V A N G S N E S, resumed.

CROSS EXAMINATION CONTINUED

BY MR. FRIEDMAN:

Q Now, sir, on container ships, we are talking about ships that primarily or exclusively carry containers such as this, these 20 by eight by eight containers, or other sizes?

A That's right.

Q On those ships, am I correct, that they have built into them, so to speak, when they are standing empty without any containers in them and as part of the ship's construction, these ships or some of these ships have steel framework into

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which the containers fit when they are placed into the vessel?

A That is correct, some of the ships have.

Q I don't know how familiar you are with supermarkets in the United States, but where the steel -- I mean on a small scale in a supermarket, the steel shelves in a supermarket contain package items and the package items go in one on top of the other within the steel framework; are you familiar with that?

A Yes.

Q That's a rough kind of analogy, but that's the kind of thing we are talking about on the container ships; right?

A Yes.

Q And those steel frames in themselves contain or hold the containers; right?

A That is right.

Q And when those steel frames are used the containers are put into those steel frames in multiple tiers, two, three even more tiers; right?

A That is right.

Q And stacking devices are used between the various tiers?

A That is also correct.

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Q Now, in the case we have here of the Concordia Viking, out on the deck where there were these 76 containers, you did not have available, could not put in place anything at all similar to these steel frameworks; correct?

A That is correct.

THE COURT: When you answered before about containers, were you talking about in the holds or on deck or both or what?

THE WITNESS: Both. The container ship carries containers all over.

THE COURT: Now, on deck you have what kind of framework?

THE WITNESS: On deck we have none, no framework.

THE COURT: But the framework, the slots would be in the holds?

THE WITNESS: That's right.

THE COURT: But not on deck?

THE WITNESS: No.

Q Now, sir, even though the containers on the container ships are down in the hold and within steel vertical rails that are made, so to speak, for the size of the container so that they fit in, they still use the stacking devices between the containers there; right?

A I don't know.

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Q Well, excuse me, sir. But did you not say literally two and a half minutes ago -- I thought I was going to be cut off for being repetitious -- that down in the holds of container ships they have these steel frame-works and they put in the containers tier on tier, and within those steel frames they employed stacking devices between the tiers; didn't you answer that question in the affirmative literally within the last three minutes, sir?

A I understood you were talking about the container ship I was on.

Q And was that so for the container ship you were on?

A No.

Q I'm sorry, sir. Three minutes ago --

THE COURT: I think there was confusion. I think you asked him generally. Nobody at that particular moment was distinguishing between the hold and the deck, so let's start over and be precise.

MR. FRIEDMAN: I'm sorry. I don't think that's the distinction.

Q Did you not answer --

THE COURT: Let's not worry about what he answered three minutes ago. The jury remembers it.

MR. FRIEDMAN: I will proceed from there, your

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Honor.

Q Now, on container ships, have you seen placed in use on the deck what are known as, and I will show you Exhibit 6, to point out one; do you see the one that's called "Single Stacking Adaptor"?

A Yes.

Q Well, is that a picture of exactly what you see -- we happen to know there is another prong on this Exhibit 11. Just ignore the prong that protrudes below. The picture in Exhibit 6 is what is visible on Exhibit 11, the top part?

A That's right.

Q A plate with an upward prong?

A That's correct.

Q Have you seen on container ships when they do carry containers on the deck, that among the equipment they use are these kinds of -- when I say these, I should point to the one shown in the photograph, Exhibit 6, with the plate and this plate is welded, bolted, affixed to the deck itself and the first tier of container is laid into a prong like that. Have you seen that?

A Yes.

Q Am I correct that on the Concordia Viking for the deck containers that were carried on this voyage, that equipment was not employed?

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A That is correct.

Q Now, on the Concordia Viking with respect to the deck containers, the only thing that was employed to secure the 76 containers on the deck were chocking materials of a wooden nature down at the base; is that right?

A That is right.

Q And wire rope lashings from the top of the second tier where there were two-tier containers?

A Yes. And we had dunnage in between.

Q The dunnage in between was primarily with respect to the level at which the containers would be, so to speak, sitting, as distinct from holding it in a particular place; correct?

A It was there to hold it in the particular place.

Q Your testimony is that wooden strips laid under the bottom tier and in between the bottom and the top tier had the effect of holding the boxes in place as distinct from affecting the level or horizontal condition of the boxes; is that what you are testifying to?

A That is right.

Q That's your testimony, all right.

A Because steel against steel is no good.

Q In any case, would you agree that at least the primary force or method of holding the boxes in their place,

the way they were put on the deck of the Concordia Viking, was the strain, the pressure, if that is the right word, being applied by the deck lashings and their tightening up through the use of the turn buckles?

A Yes, and the weight of the container itself.

Q Now, let me ask you this, sir: we now have had described to us at least two different ways of securing containers of this type aboard a vessel on deck, and let's just deal with the deck. One is, if you recall a few questions ago, single stacking adaptors, and I think that is the phrase they used; right?

A Yes.

MR. FRIEDMAN: So the jury will know which one we are referring to, it is the bottom left-hand corner on Exhibit 6, as you look at it (indicating).

Q On the bottom level welded or bolted into the deck and for the second or higher tiers in between each, these kinds of devices (indicating), correct?

A That is correct.

Q Then further to that you would also apply lashings tightened with turn buckles?

A That is correct.

Q Another method that can be, and indeed was used on the Concordia Viking, was no single stacking adaptor on

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the deck, no double prong between the tiers, and using wooden -- excuse me. One more question and I will withdraw the one I just started.

When the stacking devices are used as we discussed, the single and then the double on the deck tier, would dunnage be employed between --

A No.

Q How about chocking on the side?

A No.

Q Do you still employ chocking?

A No.

Q Let me ask you this: the stacking devices, do they -- they are located in the four corners of the box; right?

A They are.

Q So I'm clear, did the boxes usually -- we have this sort of upside down, as I understand it. Am I correct that there is sort of a beam that provides a sort of space, call it an air space, between the very bottom of the box, except where the beam is, and the surface, the deck surface on which it sits?

A The container rests on the four corners.

Q That's what I am saying. So except for the four corners or the edges of the box, there is air space that you

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could put dunnage in?

A Yes.

THE COURT: You were saying two things in the last few minutes.

You said the four corners and the beams, or somebody said that.

THE WITNESS: I didn't.

THE COURT: Anyway, the corner casting, does that sort of stand out by itself or is there a rim or beam that runs along the bottom?

THE WITNESS: There is a beam along the bottom, but that doesn't touch the floor.

Q That's what I am trying to find out. So except where this beam is, which runs along the rim, the edge of the box, there is, so to speak, air space between what is the floor of the container and whatever it's sitting over?

A That is correct.

THE COURT: Let's take the end of the container, that's eight feet wide; right?

THE WITNESS: Yes.

THE COURT: At two corners you have what you call corner castings. Is that like the example we have sitting in front of you?

THE WITNESS: Yes.

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THE COURT: It looks to me there as if the corner casting is level with a kind of beam or rail that runs -- I don't know how it runs.

MR. FRIEDMAN: May I turn it around so you will see. There is a slight drop. I don't want to measure it. Your Honor can see for yourself. It's less than the width of my pinky.

THE COURT: How about running perpendicular to those?

MR. FRIEDMAN: It's also a little less than my pinky, between this beam and this surface.

THE COURT: Let me ask you this, Captain: you have the corner casting in front of you?

THE WITNESS: That's right.

THE COURT: Running from one direction in the corner casting is a piece of metal that is a little bit lower than the corner casting; do you see that?

THE WITNESS: Yes.

THE COURT: Running in another direction from the corner casting you have a piece of metal which is level with the corner casting -- at least that's the way it looks on the example.

THE WITNESS: From the end of this piece the metal will be lower again.

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THE COURT: Just a moment.

THE WITNESS: This goes only for the corner.

THE COURT: Can I ask you, the piece that is level with the corner casting, do you see that?

THE WITNESS: Yes.

THE COURT: Now, is there such a piece on most containers?

THE WITNESS: I can't say.

THE COURT: What I am trying to find out is, is there a piece of metal which is level with the corner casting that runs along the end, the eight foot end?

THE WITNESS: No. There is a space like this (indicating).

THE COURT: About a half an inch?

THE WITNESS: Yes. Along the whole container.

THE COURT: So the beams or the edges that run around the bottom, both lengthwise and crosswise, they are not level with the corner casting?

THE WITNESS: No.

MR. KAIN: I think what your Honor is talking about is depicted in D and E in evidence.

THE COURT: So, in other words, that example to that extent is inaccurate; right?

THE WITNESS: Yes. There are different companies

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making these containers, so they make different a little bit.

MR. FRIEDMAN: I think the photograph may help.

Q Exhibit E, the photograph, can you see along the side some of the, so to speak, space or the entry into the space along the 20 foot length of the container?

A Yes.

MR. FRIEDMAN: Does your Honor want to see it before I show the jury?

THE COURT: Yes. Thank you.

(Pause)

Q Using this, has it been used in the past as sort of an example of a container, you see the way this surface flatly sits on whatever it's sitting on; in other words, the whole plane sits on the surface it's sitting on. You see that?

A Yes.

Q Am I correct with respect to the cargo containers, it doesn't sit flat that way but there are just at the four corners, and you correct me if I am wrong, a piece running the entire space around here but that protrudes a little bit so that this whole surface is not actually sitting but it's raised a little bit?

A That is correct. It's resting only on the corner.

MR. LEONARD: May I have that last answer? Did he

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say resting only on the corners?

THE WITNESS: Yes.

Q Now, I will continue while the jury views the exhibit.

To get back to what I asked you about, sir. Whether the stacking device is in place or is not being employed, one could physically insert dunnage between either the bottom tier and the deck or the top tier and the bottom tier, whether you are using the stacking devices or not using the stacking devices; correct?

A Yes, but you will hurt the container, you will damage the container.

THE COURT: How much space is there between the major part of the bottom of one container and the major part of the top of another container when they are sitting together with stacking devices?

THE WITNESS: I would say some four inches.

Q Here we have what we agreed upon would be fairly similar to the top of one corner of a cargo container before the next one is put on top of it, using a stacking device; right?

A Yes.

Q In other words, this corner (indicating on blackboard okay?

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A I didn't get your question.

Q This model, if one were using a stacking device, shows generally the position and the situation of the top corner of a cargo container, bottom tier, before the next container is placed on it?

A Yes. But that is a bottom corner of a container.

Q Now, let's take it away, the stacking device. What occurred on the Concordia Viking sometime before the ship arrived in New York Port was that the second tier container was placed on the first tier container without any stacking device between the two at the corners; correct?

A We had dunnage between.

Q You had dunnage between them but no stacking adaptor?

A No.

Q And just so I am clear, when you say you had dunnage between them, you don't mean to say that you had dunnage, wooden pieces, right in the location, the specific corner hole location, do you?

MR. LEONARD: Your Honor, counsel is indicating with his hand a downward motion. His question is not so couched and I would like to clarify it.

Q I mean right here at the corner the space that is otherwise, and was until a moment ago, occupied by Exhibit 11 --

THE COURT: You are talking about the hole in which the protrusion of the stacking device goes.

MR. FRIEDMAN: Where my hand is.

THE COURT: That's two different things.

MR. FRIEDMAN: I will ask it separately.

Q Is it your testimony that wooden strips were placed, and my hand can't be an exact example, down in the way I am sticking my hand --

THE COURT: Which is down into the hole for the stacking device.

A No.

Q Is it your testimony that wooden strips of dunnage were stuck, and I am talking about in this location, not here, not under the bottom, but I am talking about right here at the corner, just the area where my hand now covers.

A That is correct, from one corner to the other.

Q Running this way (indicating).

A Running across the container on the short side.

THE COURT: At the end?

THE WITNESS: At the end.

THE COURT: Including the two corners?

THE WITNESS: Including the two corners.

Q Now, the wooden strips covered the corners and went where? Tell us again. We have a 20 foot length, an

eight foot length.

A Eight foot length.

Q At both ends?

A At both ends.

Q So that both ends were sitting on wooden strips?

A Yes.

Q Flat wooden strips?

A That is also correct.

Q Thank you very much, sir.

By the way, this is your recollection as distinct from any notations or written documents that you had the opportunity to refresh yourself on?

A That is the way it always has been done on such a ship.

Q And you had the deck lashings as you described?

A Yes.

Q Now my question to you, sir, is this: is it your testimony that so far as the security and stability of these cargo containers are concerned, that using deck lashings both ways -- I will have to withdraw the question. I'm not sure I asked you this.

When you use stacking devices, you also, do you not, apply, as a general practice, the deck lashings with the turn buckles and take them up and tighten them; right?

THE COURT: We have had that so many times.

MR. FRIEDMAN: I wasn't sure I had that.

Q Therefore, with deck lashings in place, being employed and tightened in both circumstances?

A Yes.

Q Is it your testimony that employing a flat wooden strip between the two tiers of containers is a more or less secure method of securing these cargo containers than employing these pronged stacking devices?

A Yes, it is.

Q The dunnage is better?

A I didn't say better. I said it is equal.

Q You say it is equal?

A That is the way it's done on all cargo ships which don't have these devices on board.

THE COURT: Which don't have what? I didn't hear you.

THE WITNESS: Devices, stacking devices on board.

Q Now, sir, can we agree that if you take the deck lashings off, if they are released, become slack, that so far as serving a purpose to secure those containers, once you lay those lashings or make those lashings slack, even indeed if they remain attached, they are no longer serving an effective purpose of holding the cargo containers

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in place; correct?

A Yes.

Q Is it your testimony --

THE COURT: Did you answer?

MR. FRIEDMAN: I think he said yes.

THE WITNESS: I did say yes.

MR. FRIEDMAN: He did say yes, I'm sorry.

Q Now, at that point am I correct, once the deck lashings have been laid slack, with respect to the cargo containers moving from side to side, in the absence of stacking devices the boxes, the cargo containers are simply subject to Newton's laws of physics in terms of gravity, momentum, inertia; there is nothing else that is holding them in a particular place?

MR. KAIN: I don't believe they are Newton's laws.

MR. FRIEDMAN: I learned them as Newton's laws. The laws of physics.

THE COURT: Let's defer the summation. You can argue that to the jury. Let's have questions of fact and go on.

I'm sure by now the jury knows that if lashings are released, lashings are not holding and they can perfectly well picture that if you have these containers lying on wooden strips, they are free to move except by their own weight and

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whatever indentation they have put into the wooden strips on which they lie.

Is that not correct?

THE WITNESS: That is correct.

THE COURT: All right.

MR. FRIEDMAN: Thank you very much, your Honor. That's fine and I will move on.

Q Now, sir, was any ship's officer -- I think you already told us you were not -- was any ship's officer present in the number four, five hatch area at about 8:45, nine o'clock in the morning in connection with any of the discharging operations that were going on?

A There was none at number five.

Q I'm sorry to press it, but are you saying there was somebody at number four?

A I didn't say it.

Q Well, I'm asking.

A I don't know.

Q You know there was nobody at number five, you don't know one way or the other as to number four?

A No, because I asked if there was anybody at number five and they said there was nobody.

Q You didn't ask whether there was anybody at 30 feet away at number four?

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A No.

Q Now, am I correct that at this time, the point in time I have just asked you about, 8:45, nine o'clock, that discharging operations were under way, had been under way since 8:30 in the morning, not only at number five and number four hatches but at number one, two and three hatches, and that is shown in the deck book?

A That is correct.

Q And am I correct that all five of those hatches were discharging cargo starboard side in the direction shown in the arrow on this drawing on the blackboard?

A That is also correct.

Q And were they all using booms to do so?

A They used one of the ship's booms and a house fall.

Q In order to use the house fall didn't they also have to use ship's booms?

A One.

Q You mean each hatch used one?

A Yes.

Q You mean there were five booms of the vessel over the starboard side or swinging towards the starboard side?

A No.

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Q There were five booms of the vessel in use transferring cargo to the starboard side?

A But the booms were situated over the port side.

Q Lifting cargo or helping transfer the weight of cargo along all of that, and I don't want to repeat all of the wire procedure, in the starboard direction; is that right?

MR. LEONARD: I object to the motions that counsel is making with his hand in relation to a boom. There has been no mention in the testimony that any boom ever moved.

MR. FRIEDMAN: I'm trying to relate to the cargo weight being moved.

MR. LEONARD: Thank you.

MR. FRIEDMAN: That's what I am using my hands to indicate.

THE WITNESS: It has to be moved, yes.

Q Now, I want to give you, if I may, the log book. Did you tell us that the dead weight cargo capacity of the Concordia Viking was in the neighborhood or region of 13,000 tons?

A The dead weight of that certain vessel is 10,070 tons.

Q Mr. Kain has suggested I hand you Exhibit C.

MR. KAIN: I thought you were asking him what the

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dead weight and displacement weights are.

MR. FRIEDMAN: That's exactly what I meant to ask him.

Q Using the log book or Exhibit C; which is, I think, a plan that shows cargo facilities, can you tell us what was the dead weight cargo capacity of the Concordia Viking?

A It is written here in the log book, 10,070 tons, dead weight.

Q And you are saying it was not 13,000 tons?

A It is written here in the book.

Q I understand. I am just trying to find out because there were certain questions posed by Mr. Kain.

In fact, with the Court's permission, may I consult with Mr. Kain?

THE COURT: Yes.

(Discussion off the record)

MR. FRIEDMAN: There was different terminology that Mr. Kain used. He referred to displacement tonnage and that was the 13,000 ton figure.

Q Now, my question to you is this, sir: how much in weight, in tonnage approximately was the Concordia Viking carrying when it arrived in the port of New York?

A You can find that in the cargo plan.

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Q I am going to ask you to find it (handing).

A The ship was carrying 4,932 tons total.

Q I'm terribly sorry, it is my fault and not yours, but I'm not getting the numbers clearly.

A 4,932.

Q So it was a little bit less than one-half of its cargo capacity in tonnage?

A The dead weight does not mean the cargo capacity. That includes also the bunker and water and storage.

Q So then what was the cargo counting the items you mentioned approximately that the vessel was carrying when it arrived in the port of New York? I mean how much more would you add for the items you have mentioned?

MR. KAIN: If your Honor please, I think there is some confusion. I understood the witness to say the dead weight tonnage includes not only the cargo lifted but water and bunkers carried on board the ship.

MR. FRIEDMAN: I asked him to add to that his best estimate of weight of those items.

MR. KAIN: You mean the amount of water and fuel oil carried?

MR. FRIEDMAN: Yes.

THE COURT: You mean does the 10,070 -- what is that?

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THE WITNESS: That is the weight that the ship can carry.

THE COURT: And that includes cargo, fuel oil, water, supplies?

THE WITNESS: That's right.

Q And you have told us that the cargo was 4932 tons. Now I am asking, and you said there were still a couple of additional items to be considered towards the 10,070 total, and I am asking you approximately what was the weight of those additional items?

A It was approximately 120 tons of fresh water. Usually there is approximately 300 tons of storage on board. And how much bunkers which was left on the ship I cannot say.

Q Can you give us, from your years of experience, an approximation, upper limit?

A I would say something around 300 tons.

THE COURT: Bunker means oil?

THE WITNESS: Oil, yes.

Q I make that 5,652 tons against the 10,070.

A Excuse me, I might be wrong on the item of the oil because --

Q It might be 500?

A It might be much more, because we were taking

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bunkers only in the Persian Gulf for a round trip. That means we didn't take bunkers in the United States. We had to go all the way back. That means we had at least eight or nine hundred tons left on the ship, arriving here in New York.

Q I don't want to spend a lot of time. You want to change one of those three hundred figures to nine hundred?

A Yes.

Q We will add 600 on then and we are up to 6200; okay?

A Yes.

Q So that as against the dead weight capacity of the vessel of 10,070, there may have been as much as 6200 tons?

A Yes.

Q Now, let me ask you another question, can you tell us during the voyage, the ocean voyage into New York, did the vessel carry any ballast?

A No.

MR. KAIN: May I ask counsel if he is referring to ballast as such or is he referring to ballast permanently built into the ship?

MR. FRIEDMAN: It is a ballast, temporary ballast.

A There was no ballast on the ship.

Q Now, how would you characterize, sir, the load of

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this vessel as it arrived in the port of New York carrying 6200 tons against its 10,070 capacity, light, heavy, what?

A I didn't get your question.

Q How would you characterize the load of this vessel as it arrived at the port of New York carrying 6200 tons against its capacity of 10,070, was it heavily loaded, something less than heavily loaded, light?

A A little less than heavily loaded.

Q A little less than heavily loaded. Heavily loaded would be 10,000 tons; right?

A That's right.

Q Now, the cargo -- there were these 76 containers that were up on deck and am I correct there was no cargo higher than that?

A No.

Q Now, the cargo that was in the hold -- was there any other deck cargo except these 76 containers?

A No.

Q Now, did other cargo in the vessel, was it what is known as general cargo?

A As general cargo, yes.

Q Was it mostly bags of different kinds of food commodities?

Do you have the list that shows that?

MR. KAIN: He has the list.

MR. FRIEDMAN: I saw a list that gave the names of a lot of commodities.

THE WITNESS: Frozen shrimps --

Q You don't have to recite them all. I am trying to get a generalization.

Cereals and pistachios and carpet and licorice, gum.

A And the frozen shrimps is very heavy cargo. The licorice, pistachios and empty cylinders, canned shrimps.

Q So what I am trying to find out, sir, would it be fair to say that the great part of that cargo was carried in bags?

A Yes.

Q Would it be fair to say that the great part of that cargo was not of the type of cargo of pig iron, steel, cargo that in a small area of space nevertheless involves a considerable amount of weight?

A It was general cargo.

Q Do you agree with my last statement, sir?

A There was no pig iron.

Q Would it be fair to say, sir, that there is a

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general practice on cargo ships to consider when loading cargo the course and the process that will be involved in discharging cargo? That's one of the considerations.

A That is correct.

Q Is it fair to say that as a general rule the higher the cargo is carried in the hatches, the quicker and, therefore, cheaper for the shipowner it is to discharge the cargo?

A Yes, it is, but I don't take those things in consideration when I'm loading a ship.

Q Now, when this ship came into the port of New York were any preparations made or is it the general practice to assist in the discharging operations that would take place by such methods as greasing, making ready the winches and booms that are going to be used b the stevedores for discharging?

A Yes, we make ready for discharging.

Q One of the considerations in making ready is also the turning loose of the cargo that has to be unloaded?

A That is correct.

C That is what led to the releasing of the deck lashings on these deck containers before the stevedores came on; right?

A That is also correct.

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Q And do some ships, when they come in or dock, and one side is along a pier sometimes move, shift any of the water or oil that is down in the tanks from one side -- some of it, not all of it -- from one side to the other to give a slight lean of the vessel into the side to which the discharge is to take place to assist in the ease of the discharge operation?

A No.

Q No ships ever do that?

A No. None of those I have been on.

Q Now would it be fair to say, all other things being equal, the higher the vessel is in the water the more it will have a tendency or inclination to roll?

A No.

Q That is not a true statement?

A It depends on where the weights in the ship are placed.

Q I'm sorry, maybe you didn't understand my question. My question was the higher the weight in the vessel, the greater the tendency to roll; correct?

A That is correct.

Q And rolling, so we are clear, is the side to side motion of a vessel?

A Yes.

Q Now, the Concordia Viking, when it came into the port of New York on the morning of July 12, 1971, how high was it sitting in the water?

A The arriving draft was 21 feet eight inches forward and 23 feet two inches aft.

Q And what is the maximum or what was the maximum summer draft of the Concordia Viking?

A I don't know.

Q You don't know?

A No, I don't know.

Q What percentage of this vessel's loaded condition was out of water?

A I don't know.

Q By the way, the term "maximum summer draft," do you recognize that term?

A Yes, I do.

Q Will you tell us what that is.

A That is the maximum draft you can draw at summertime.

Q By maximum draft you mean the deepest it will go?

A The deepest you can load the ship into the water at summertime.

Q And is it your statement that as chief officer of the Concordia Viking you don't know what the deepest draft

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of the Concordia Viking was?

A Yes.

Q Would you say, sir, that it was in any case a deeper hull, a deeper condition than the level at which the vessel was sitting at the dock in Hoboken on July 12, 1971? My point is, if I may, since you indicate by your face that -- if your Honor please --

MR. FRIEDMAN: I am just trying to restate the question.

THE COURT: I don't think it needs restating. If the vessel can carry 10,000 tons and it only has 6200 tons, I assume if it had all 10,000 it would be a little deeper in the water. And the jury is nodding as if they understand the point. Let's go.

MR. FRIEDMAN: I don't know why it is so difficult to extract a point from the witness.

THE COURT: You ask questions that if I were on the witness stand, they are so obvious.

MR. FRIEDMAN: Why aren't obvious questions easily answered instead of answering with such difficulty? Are we trying a case with an advocate on the witness stand or a witness?

MR. KAIN: I will aid the problem if counsel will let me. Defendant's Exhibit M for identification, capacity

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plan for the vessel, I would like to put in evidence. I will point out to counsel it contains the pencil markings showing the load lines. If he can read them, he can make them part of the record.

THE COURT: If we will be any better off after we hear that information, fine.

MR. FRIEDMAN: A, I have no objection to it being placed in evidence and B being placed in front of the witness and C, having the witness then tell us, if he can, what the maximum summer draft of his vessel was.

A The maximum summer draft would be 29 feet.

Q You gave us a draft forward and draft aft for July 12, 1971.

MR. KAIN: Your Honor please, the witness is being asked for a load line and draft as though they are the same.

MR. FRIEDMAN: I am trying to illuminate that subject.

Q Will you tell us whether that is aft or mean?

A It is the mean draft.

Q Sir, the more buoyant, the more up in the water the ship is, all other things being equal, would it be fair to say the more tender the ship is?

A No.

Q You say no to that?

A Yes, I say no to it. It depends on the weights in

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the ship where they are placed. You can have a stiff empty ship or ballasted ship and you can have a stiff loaded ship

C I don't know if you heard my question clearly.

THE COURT: I think he heard the question quite clearly and his answer was quite responsive. You have a very limited amount of time to complete your cross examination.

Q The hatches on the Concordia Viking, did they have automatic openings, automatic covers?

A They were opened by wires.

Q By wires?

A Wires, yes.

C And did the cover come completely off or did it, by wires or otherwise, come to the back or side or what?

A They came to one of the ends of the hatch, one by one, rolling and tipping up.

Q To which end did they come at the number five hatch?

A To the after end.

Q Which end did they come to the number four hatch?

A To the after end.

Q And the means of getting into the hatch at number five hatch was what?

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A There was a ladder in the forward end.

Q The means of getting into the hatch at the number four hatch were what?

A The same ladder in the forward end and a ladder in the after end.

Q A ladder in the forward end of the hatch?

A Yes, and a ladder in the after end as well.

Q Now, that ladder at the forward end of the hatch, was it in the center or to the side?

A It was in the center.

Q You see on Exhibit M a little square rectangle. Is that in the number four hatch or at the number four hatch?

A Yes.

Q What is that?

A That is the ladder.

MR. FRIEDMAN: With the Court's permission may an L be drawn by the ladder?

THE COURT: Surely.

Q It has been so drawn. Now, if I may, am I not pointing now to the port side deck area of the number five hatch of the Concordia Viking?

A Yes.

Q Now, from the back of the hatch, the aft end of

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the hatch, to the front end of the hatch, are we in agreement that that was some 27½ feet, 27 feet five inches?

A I can't say exactly.

Q The numbers are very small --

MR. KAIN: If you look at the general arrangement plan. You are looking at the capacity plan.

MR. FRIEDMAN: It is on there. It is just that you need good eyes to read it.

THE COURT: Didn't we have that witness Captain Ash. He said 27½ feet. It is over there on the blackboard.

MR. FRIEDMAN: That's right.

THE WITNESS: Yes.

Q So taking a look at the drawing, Exhibit M, and this line to that line is 27 feet five inches; right? The line I have just pointed out to you is a line that reflects 27 feet five inches?

A The hatch opening. Yes, 27 feet five inches.

Q Now, can you see that the line is divided into four equal parts by little lines drawn on the diagram in this particular exhibit; do you see that?

A Yes.

Q So that three-quarters of the way over would be about 21 feet; right?

A Yes.

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Q And so about 20 feet would be just short of that line; correct?

A Yes, that is correct.

Q And up against the rail, the bulwark, the port side railing, am I now holding my pen in just about the location that is about 20 feet forward of the aft end of the number five hatch on the port side deck area along the offshore rail? Would you agree?

A Yes.

Q I am going to put a mark right there.

Now, sir, the second tier container, the top surface of it was sixteen feet above the deck; correct?

A Yes.

Q At that location?

A Yes.

Q Thank you very much.

Now, have I this ruler on a direct line between the ladder and the spot described in the questioning a few moments ago?

A Yes, but this is not the corner of the containers, if that is what you are trying to fix out.

THE COURT: Keep your voice up, Captain.

THE WITNESS: The container was not stowed from the edge of number five, the after edge of number five.

It was stowed behind them.

Q Behind the number five hatch?

A As far aft as possible on the deck.

Q Now, don't we have in Exhibit D a picture that is looking aft, looking towards the rear of the ship right in the area that we have been discussing, the port side number five hatch deck area?

A Yes.

Q I'll tell you what, Captain, you draw the line for me.

A I have to have the measurements of the deck.

Q No, no. All I want you to do, or if you want I will do it. I just want your agreement. I have now the ladder and the place that we marked approximately 20 feet from the back of the hatch along the offshore rail on the port side of this vessel; right? I have that in a straight line with the ruler?

A Yes.

MR. FRIEDMAN: With the Court's permission I draw the line.

MR. KAIN: If your Honor please, so I can perhaps shorten things, if counsel is attempting to demonstrate line of site, may I note an objection to his computing the end of the contai er as flush with the after end of number

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five hatch, because the witness has clearly stated that the container was aft as it was stowed, the after end of the container was aft.

MR. FRIEDMAN: Unfortunately, Mr. Kain, there are also photographs in evidence.

THE COURT: I haven't seen what the markings are, so I don't know what the problem is.

MR. FRIEDMAN: I will hand it up to your Honor.

(Pause)

THE COURT: Who made the line? Mr. Friedman?

MR. FRIEDMAN: Your Honor, I must respond to that. I made the line as the Court, I hope, observed, after I set up the ruler, asked the witness whether I now had the ruler directly in the line between the location he identified as the ladder location and the location he identified as being approximately 20 feet forward of the back end of the number five hatch along the port side rail. Now, he confirmed I had the ruler in exactly that location, in a straight line between those two locations and in front of him I drew the line.

THE COURT: What is wrong with that?

MR. KAIN: My objection was, if I understood the captain's answer correctly, he testified that the after end of the container was at some point aft of the after hatch

coaming of number five. That is what my question was directed at, that Mr. Friedman with his line was demonstrating that the after end of the container was flush with the after coaming at number five.

THE COURT: It doesn't seem to me there is much space to have it too far aft.

MR. KAIN: All I asked, if your Honor please, if Mr. Friedman was drawing this in response to the witness' testimony, that it conform to the testimony as I understood it.

THE COURT: Captain, will --

MR. FRIEDMAN: May I do this, your Honor? There is a drawing a little bit larger that covers the exact same area and I don't mind going through the same questioning along the lines Mr. Kain has mentioned, reserving my rights as who testified where the container was. I will pursue it over again.

THE COURT: Let me see the photograph for just a second, please.

THE WITNESS: Yes.

(Handing)

THE COURT: Do you remember where the aft end of the containers were? Were they lined up with the aft end of hatch number five or were they back of it, and if so, how

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far?

THE WITNESS: In order to get as many as possible on deck we had to start from the very aft end of the deck and work forward.

THE COURT: Now, how far aft of the after end of hatch number five was the aft end of the containers?

THE WITNESS: It was all the way up to the ladder which is shown here.

THE COURT: You tell me how far that was?

MR. FRIEDMAN: May we use this slightly larger scale drawing? I think your Honor will see that it helps considerably on that particular point.

THE WITNESS: That would be approximately two and a half feet.

THE COURT: Two and a half feet difference.

All right, Mr. Friedman.

MR. FRIEDMAN: Thank you very much, your Honor.

Q Just so I am clear as to this --

MR. LEONARD: Your Honor, there was a representation made before that Captain Ash drew from the length of the hatch measured as 27 feet five inches.

As I read the stowage plan here, the hatch -- the general arrangement plan, the hatch at number four was a different size than the hatch at number five and I don't want

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the record to indicate confusion with respect to that.

MR. FRIEDMAN: 37 feet five inches.

THE COURT: All right.

MR. KAIN: The principle he is working with, if he is working with number five hatch I submit the dimensions on the board are accurate. If we are talking about number four they are not.

THE COURT: Go ahead, Mr. Friedman.

Q So we are clear on it, the number four hatch, the forward end of it was 37 and a half feet forward of the aft end of it, which in turn was some distance from a center mast house on the vessel; right?

A Right.

Q The distance from the steps, and we will use with the Court's permission Exhibit C because it is bigger, we have on Exhibit C the same vessel laid out except on a bigger scale; is that right?

A Yes.

Q Now, am I pointing now to the ladder or steps that you just referred to right in that area in response to his Honor's questions?

A Yes.

Q With the Court's permission I will circle that and I will call that S for steps.

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Have I done that correctly?

A Yes.

Q Now, is it your testimony that -- by the way, where did those steps lead to?

A To the poop deck.

Q And what is on the poop deck? Crew's quarters?

A Crew's quarters.

Q Was that ladder used during the course of the voyage?

A No. This ladder was used (indicating).

Q This ladder was simply not used at all (indicating)?

A This was the way we made (indicating).

Q Am I correct, so we don't spend too much time on it, that the starboard side also had these large containers stowed on deck?

A Yes.

Q And is it your testimony that you have a recollection at this time that the layout of these containers was such that you backed up the containers on the port side against the ladder but not on the starboard side? You remember that?

A No -- yes, I remember. But on the starboard side we had only one container. So that went outside of the ladder.

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Q Now, the distance between the -- take a look at this drawing. Are you saying that from the line projected of the back end of the number five hatch and the line where the ladders are, that that's a full two and a half feet?

A Approximately I would say.

MR. KAIN: Your Honor please, I think the general arrangement plan is 200 to one. If counsel --

MR. FRIEDMAN: I can't do it with this ruler. If somebody would bring a fine point ruler up we will measure it.

MR. KAIN: I thought I could shorten it.

Q Now, with the Court's permission, I am going to go back to Exhibit M, the same one I drew the line on pursuant to your answers before.

What I want to do, sir, is I am going to move the spot that we used before back two and a half feet; okay?

A Yes.

Q Now, are we in agreement that with these four divisions of the number five hatch on the drawing, that if it is 27.5 feet for the full distance, we have 13 and three-quarter feet at the midpoint?

A Yes.

Q So 13 and three-quarter at the midpoint plus

the two and a half that you say it started behind the back end of the hatch, two and a half feet, then we have a distance of sixteen and a quarter. So projecting that up against the rail we actually have somebody who isn't even at the front end of the container, he is four feet back from the front end of the container, three and a half feet back from the front end of the container; right?

A I didn't get you.

Q Let's get it clear. If the back end of the number three container was as far back on the ship as it physically could be, right up against that little step --

A Yes.

Q -- then the front end of it would indeed be forward, past the midpoint of the hatch; right?

A Yes.

Q Because the midpoint of the hatch is thirteen and three-quarter, add the two and a half and it would project beyond.

A Yes.

Q So somebody was alongside, not even at the very forward end but alongside the midpoint of the hatch he would be sixteen and a half feet forward from here and that would be the location; right?

A Yes.

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Q So if we project the midpoint of the number five hatch against the port side rail we will have that location; correct?

A That's correct.

Q Now, sir, do I have as one point for this line the ladder?

A Yes.

Q Do I have for the other place of the line the place we agreed on, along the port side rail?

A That is right.

(Counsel draws red line)

Q Now, that's the red line; right?

A Yes.

MR. FRIEDMAN: With the Court's permission may I show this to counsel and then to the jury?

THE COURT: Yes.

(Pause)

MR. KAIN: The blue line?

MR. FRIEDMAN: The blue line is the line first drawn and represents the position approximately along the port side rail, approximately 20 feet forward of the back end of number five hatch.

The red line is drawn from the position thirteen and three-quarter feet forward of the back end of the number

five hatch, sixteen and one-quarter feet forward from the steps that form the very back part of the port side, number five hatch deck area.

Did I say that all right?

MR. LEONARD: Yes.

MR. FRIEDMAN: Does your Honor want to see the red line?

You have seen that, I know.

I will pass it to the jury.

(Pause)

Q Now, sir, you have told us that the ship's crew, so to speak, intentionally, it was part of the orders and routine you say to release the deck lashings before the stevedores came on; right?

A I did, yes.

Q My question to you is this: was it the intention that the ship's crew, the different men doing their work, would indeed release all of the deck lashings from all of the cargo containers?

A Yes.

Q Now, as there is some indication, two or more or some deck lashings were left on top of what we marked here as the number three container or the number four container, any of those containers, that was not the intent or purpose;

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that was some oversight?

A Yes. They were supposed to take them away, ready to discharge. That means sometimes wires are left on the containers. As long as they are loose from the deck.

Q It was intended that these would be taken -- the intention was they were to be taken off?

A Yes.

Q Now, my question to you is this: it is not the intention or purpose or desire of the ship and the company that owns the ship that these containers be lifted off the vessel, brought down to the pier, with any of the deck lashings still attached or trailing on the container; right?

A No. If it can be used again, it is.

Q If it can be used again you want it?

A Yes.

Q Would it be fair to say in order to hook up this cargo and lift, as we indicated here very roughly, there are hooks that have to be placed onto the corners of the containers to lift them off?

A Right.

Q And can that be done by putting ladders against the sides of the containers and going up and hooking them in?

A Yes.

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Q So that to hook up the containers and lift them off, that was the only procedure that was necessary?

A Yes.

Q A person would not have to get up on the top, on the roof of the top container; correct?

A No, he doesn't have to.

THE COURT: To put the hooks from the boom into one of those top containers, what is the usual way of doing it, do you know or don't you know?

THE WITNESS: There are different ways.

THE COURT: You said to Mr. Friedman you could do it by ladders. There is an interior corner, isn't there?

THE WITNESS: Yes.

THE COURT: You couldn't get to that by a ladder, could you?

THE WITNESS: No.

Q Now, let me ask you another question. Can you tell us, sir, for whatever reason, either to hook in the interior corner or because there are attached unslackened lashings that were, for whatever reason, oversight or otherwise, left up there. A man goes up onto the roof of the top container and the containers are together in this way, is it a proper method of discharging of cargo to proceed

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with the lift-off of one container --

MR. KAIN: If your Honor please, I object to this as improper cross examination. I have no objection to the master answering or Captain Vangsnes answering any questions which he may be able to ask expressing opinions. But I submit it is improper cross examination and I ask your Honor to instruct the jury that Mr. Friedman, by asking these questions, is in effect making the captain his witness for those particular questions which have to do with stevedoring practice. I did not ask this witness anything on direct examination about proper stevedoring practice.

MR. LEONARD: I have an objection, too. If the purpose of this is to qualify this witness as an expert witness, a tender of proof thus far to be completed by a proffer of evidence as to the stevedoring contract, is that the stevedores were the ones in charge of this discharging.

I object to the expertise attempted to be elicited from this witness as to stevedoring practice.

THE COURT: I would have to study my notes. It would be a fine line for me to draw to determine whether this is so unrelated to the direct that it's improper cross. I don't think it is going to particuarly help the jury to have that distinction drawn. So, frankly, Mr. Kain, just to avoid the necessity of delay, I will overrule your

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objection.

As far as Mr. Leonard's objection, I think it's up to the witness if he doesn't know the answer, if it is beyond his knowledge or expertise, it is up to the witness to say he doesn't know.

In other words, if you don't know about stevedoring practices, just say you don't know. If you do, say so. Do you understand?

THE WITNESS: Yes, I understand.

THE COURT: We will go ahead on that basis.

MR. FRIEDMAN: May I have the reporter read the question.

(Question read)

MR. LEONARD: My objection to this question does not call for the witness' knowledge of custom and practice but asks him to reach a conclusion as to the propriety of the practice the question assumes. That is beyond the expertise of this witness.

THE COURT: You are repeating what you said and I will repeat what I said. If he doesn't know he should say he doesn't know. If he knows and can answer and understand it, there is no inherent reason why he can't answer.

It is time for our recess and we will take that now.

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(Recess)

(In open court - jury not present)

THE COURT: Mr. Kain, what is the practical effect of this: Let's suppose this goes beyond the scope of your direct. Mr. Friedman is making this man his own witness on these points. Just tell me what it means to you.

MR. KAIN: It means to me only that, as I understand it, Mr. Friedman, with respect to only these items he is making him his witness, he is bound by the answers. I don't think he established he is a hostile witness just because he is a ship's mate for the defendant company. Maybe I'm dead wrong as to what I think he is driving at, I think he is looking at a line of site problem. I think with this he is going into stevedoring practice.

THE COURT: I did review my notes in the short recess and there is no question, you did not ask this witness about stevedoring practices, you asked him about the facts regarding a number of matters pertaining to ships loading, what cargo, what the ship's crew did to do their work as ship's crew in loosening the lashings, and so forth. Now you did not get into any stevedoring practices with him, that is correct.

I don't understand the idea of Mr. Friedman being bound by his answers. I thought if you were talking about

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your ability to impeach the witness or something like that, Rule 607 of the new rules say any party can impeach a witness.

MR. KAIN: I don't say that he can't introduce him, and I confess to your Honor I'm not thoroughly familiar with the new rules. Also I think if he is going to elicit the captain's opinion with respect to stevedoring practices, he might at least ask him a sufficient number of questions to establish his expertise. It may or may not be true that because a man is a ship's officer he becomes a stevedoring expert. I don't really know precisely what question Mr. Friedman is going to ask him with respect to that.

THE COURT: This business about being bound, I don't know about that. If you can give me some guidance on that because I don't know the meaning of that. It seems to me nobody is really bound by any piece of testimony.

MR. KAIN: I will accept your Honor's statement that anybody can impeach his own witness or any other witness, then it becomes meaningless, as I understand it. I wasn't aware of this.

THE COURT: It is Rule 607.

Let's proceed on this basis. You have worked through that site line illustration; right? And that's all finished?

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MR. FRIEDMAN: Yes, your Honor.

THE COURT: I gather you are going to ask him some questions about proper stevedoring practices and you have started on one or two of those; right?

MR. FRIEDMAN: Yes, your Honor.

MR. KAIN: Again I suggest to your Honor at the very least the captain should be asked whether in his opinion he is an expert in stevedoring or some qualification.

THE COURT: I don't think there is any harm in that.

MR. KAIN: As I stated to your Honor before the jury, if he can answer the question I have no objection to his attempting to answer it as long as it is --

THE COURT: In response to Mr. Leonard, I ruled the way I did and we all heard that.

Now I think I am going to change that to some extent. I would appreciate you asking him some modicum of questions about what he knows about stevedoring practices.

MR. FRIEDMAN: Delighted to do so.

THE COURT: I think we can get started. As long as we are together on that.

There is one point I want to cover and anticipate a problem in the charge. Mr. Friedman last night gave me Judge Motley's charge in a recent case and indicated certain

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portions he felt were relevant to this case and certain portions he felt are not relevant. I think one of the parts that Mr. Friedman felt was not relevant was the part about mitigation of damages by taking psychiatric treatment. I believe, and I want to hear from the defendants, but I believe that that may very well be a relevant part of the charge but I don't believe I have had any suggested charge on that point from either of the defendants. Mr. Friedman is not proposing it.

MR. KAIN: We are talking about mitigation, in other words he would be required to mitigate by taking either some medical treatment or the psychotherapy?

THE COURT: It was brought up by Mr. Leonard in his cross examination of Dr. Kaplan.

What I want to cover very quickly, because I think it may require some research, and if you could get -- maybe Mr. Fleming could call down to your office. Judge Motley instructed that on the question of mitigation, the defendant has the burden of proof. Now, that could be quite important and I have never seen a charge like that. I have seen lots of charges about just speaking in general terms about the duty of an injured party to mitigate. I have never seen a charge which spells out the burden of proof. Judge Motley does.

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I would like to have the law on that because I think on the damages there is no doubt that this business of the mental depression is the principal damage claim in the case. I think the jury might very well wonder what to do on the question of the failure of the plaintiff to seek any treatment. I think I have to give them some guidance on that, either saying it is of no consequence or what to do about it.

Now, the problem it posed in my mind is this: if Judge Motley is right that the defendant has the burden of proof on that, what if you have a situation where the plaintiff simply fails to seek any treatment? So, in a sense, due to the plaintiff's failure to seek treatment one doesn't really know what treatment could or couldn't do.

Now, without any prolongation of this discussion any longer, I would appreciate both parties giving me whatever law can be found on the question of how to handle in the charge this business of the plaintiff's failure to seek treatment, who has the burden of proof, and anything else you can give me on that point because I need it and I need it fast.

MR. LEONARD: May I say something?

THE COURT: Yes.

MR. LEONARD: I have dictated and it is on their

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way up, being typed now, charges exactly along the lines that your Honor has said, charging the jury that the plaintiff does have the duty to mitigate his medical damage, does have the duty to seek medical treatment and undergo it. I cite in those charges, and I will have them amplified in view of your Honor's concern, the decision of Judge Weinfeld in the case of Young versus American Export Lines, whose citation I don't have here with me --

THE COURT: Does he deal with the burden of proof?

MR. LEONARD: I tried the Young case.

MR. FRIEDMAN: Does he deal with the burden of proof?

MR. LEONARD: There was no charge in that case that the defendant had the burden of proof. Instead, Judge Weinfeld --

THE COURT: I didn't mean to introduce this to have a discussion on the point now. Really by night I want the law. I don't have to have a fancy memo, if I just have some cases.

MR. FRIEDMAN: I can give you the cases. Part of the case law for Judge Motley's result in the New York pattern jury instructions there is a specific charge, and I don't have it in front of me, but I can say it is toward the rear of the volume and there is case commentary on it. It

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specifically cites cases to that effect.

THE COURT: Listen, Mr. Fleming, just before you go, there is a very practical problem here and it may be different from just lots of other problems dealing with the duty to mitigate. And I don't know, there may be law on this specific problem as to what happens if the plaintiff has failed to even attempt to get treatment. Now, what does that do to the burden of proof? If I say that the burden of proof is on the defendant to show a breach of the duty to mitigate and the consequences of that breach; then if I were on the jury, I would have some problems with that because I would say to myself, "Okay, the defendant has the burden of proving the consequences of the failure to seek treatment. I don't know what those consequences would be." I might as a juror say that. I don't know what those consequences would be. He never tried to get treatment. I can't speculate. What would have happened if he sought treatment, I don't know. But the judge told me the defendant has the burden of proof, so doubts are resolved against the defendant in favor of the plaintiff.

Now, that could be a very unfair result where the doubts on the subject are created by the very failure of the plaintiff to seek the treatment. So I want to be very careful about just blithely going into any simplistic

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statement of the burden of proof.

We have to consider the particular facts of this case. I'm sure that this isn't the first time anybody has ever faced this problem.

MR. KAIN: Just for my own guidance, may I ask your Honor if your recollection is the same as mine. I am under the impression that I heard, in response to Mr. Leonard's questions addressed to Dr. Kaplan, that Dr. Kaplan's opinion that probably, or at least there was some possibility, he couldn't state it categorically because it differed from individual to individual --

THE COURT: He said probably it would help, but how much we don't know because nobody has tried it. In other words, if we had a situation here where the plaintiff had gone to psychotherapy or had attempted to take medication and then the record showed it helped but didn't help very much and he is still left with this condition of X, Y, Z, then we would have a record where we knew something.

MR. KAIN: I thought Dr. Kaplan indicated that the length of treatment, whether it would be helpful, the medication such as tranquilizers, things of that nature, that in other words the effect on the individual varies from individual to individual.

THE COURT: You are not saying anything much

different than I am.

MR. KAIN: Isn't that some proof, your Honor please? The plaintiff has conceded as I recall it, that he didn't attempt to obtain it. Isn't there a concession in the record from the plaintiff that he never got --

THE COURT: Mr. Kain, I don't want to take a lot of time on this.

MR. FRIEDMAN: May I be heard for just a moment? I did live through just such a situation with Judge Motley. When that issue was raised by the defendant they presented evidence and presented a position to the effect that the man would gain and would benefit from treatment, would be improved. There was evidence in the record by at least some witnesses, indeed some of the cross examination elicited it to that effect. Then there was the question of whether he was receptive and whether indeed, and this was an important point, as one of the sequelae aspects of his emotional disorder and psychiatric illness he wasn't inhibited and being receptive and enter into psychotherapy --

THE COURT: This is something you can argue to the jury.

MR. FRIEDMAN: All of that evidence and testimony was elicited once the defendant raised the contention that this was an issue in the case. And because they have that

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burden of proof and it was dealt with in testimony and led to Judge Motley's charge on the issue. In this case, and you can see Dr. Kaplan's report, it was never raised and never suggested. You heard what Dr. Kaplan, to the extent he passed on the subject and the degree of his comments, and that is all that has been presented in this case. That is why I felt it wasn't an issue. It could have been an issue. They could have raised and asserted it but they never did.

THE COURT: It depends on who has the burden of proof. My memory is that nobody asked a question of Mr. Picinich about whether or not he had treatment or whether he had tried or why he hadn't. Neither the plaintiff nor any defendant asked any question of Mr. Picinich or of Mrs. Picinich or of Nick Picinich. The question was not raised by anybody.

Now, the first time it was raised was in the reading, in my memory, was in the reading of the Brown report by you where Dr. Brown says that language difficulty, such things as language difficulties and distrust, and so forth, might inhibit and might prevent fruitful treatment. So it was raised to my mind for the first time.

It was raised again, as we all know, in the examination of Dr. Kaplan. I think really by Mr. Leonard who

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raised it.

MR. LEONARD: That is right.

THE COURT: Now, I am simply asking, and I would like to simply have the law, and I don't want to try to resolve it at this point, but I would like to know who has the burden of proof.

Beyond that, I would like to resolve, beyond just dredging up a lot of cases which say defendants have the burden of proof to show failure to mitigate damages and they might be cases involving contracts to buy coal. You know, you can probably cite endless cases. But I have a situation here which I am trying to describe and we all know, where right now as the record stands, regardless of who put it in or who didn't put it in, right now as the record now stands we have a situation where there is testimony from Dr. Kaplan that there are available two basic methods of treatment to someone in Mr. Picinich's position; that is, psychotherapy and medicines. And we have the testimony from him that one might expect the probabilities are, or whatever he said, that it would help somebody in that situation. The inference is that it is worth trying. And Dr. Brown, on the other hand, said that there are barriers, certain barriers to someone in Mr. Picinich's position that might prevent the fruitful treatment.

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So that's the record. But the fact is we have the record where the proof of the pudding isn't here. In other words, nobody tried it. So we can speculate all we want about whether there would be a language barrier or whether his distrust would prevent it. The fact is he never tested the proposition and never tried it. If I were sitting on the jury that's exactly the state of facts that would go into my mind and I would wish like anything that the judge would tell me what to do with it.

It seems to me that is extremely important here and I ask you to bring as precise case law to my attention by the end of the day as you possibly can, no later than the time I deliver the charge.

MR. KAIN: For my own guidance may I ask Mr. Friedman was this burden of proof issue briefed for Judge Motley?

MR. FRIEDMAN: Of course it was briefed. I was in the case and it was briefed.

MR. KAIN: Briefed by all parties or just by you?

MR. FRIEDMAN: I have no recollection of the other side's legal efforts.

THE COURT: You told me now --

MR. FRIEDMAN: I will get what I had down to you.

THE COURT: Get the jury in.

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(In open court - jury present)

E D W I N V A N G S N E S, resumed.

CROSS EXAMINATION CONTINUED

BY MR. FRIEDMAN:

Q Now, sir, after you left the job of being chief officer on this ship in December of 1971, what was your next position?

A My next position was chief officer on coastal ship.

Q Coastal ship?

A Yes.

Q How long were you on that?

A Ten months.

Q And then?

A I went as a captain on a container vessel.

Q And for how long were you a captain on a container vessel?

A I was there from July, '73, till December, '74, with a break of three months vacation.

Q By the way, you have been six years with the company that employed you on the Concordia Viking; right? You had been six years with the company that employed you on the Concordia Viking?

A Yes. I started in 1963 and I left in '71.

Q For how many of those years were you a chief officer?

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A Since '65.

Q So six years a chief officer and you left their employ to go onto a coastal ship as a chief officer?

A That's right.

Q You had no disagreement with anybody during the course of your work?

A No.

Q In any case, in the six years you were with the company that owned the Concordia Viking, were you always on that ship or were you on different ships?

A I was on different ships.

Q Were they all of the same type?

A They were dry cargo ships.

Q Now, as you went about on those ships during those six years, just as you told us on direct where you mentioned looking at the log the different ports, was it very similar going from port to port during the course of a several month voyage onloading and discharging many times?

A Yes.

Q And would it be fair to say that as the chief officer on those trips, that one of the things that you were responsible for was the safety and security of the loading and discharging operations in each of these ports?

A As long as it was the ship and crew that was concerne

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Q Now, first of all, to the extent that the work was done by ship's crew, that was very much your responsibility and area of supervision; correct?

A I was responsible for the crew and for the ship as such.

Q Now, would it be fair to say also that when some of that work was being done by hired stevedores, in whichever port, that as chief officer you had certain duties of supervision, responsibility to see that the general procedure they were following didn't damage ship's equipment, didn't damage other parts, other cargo that remained behind on the ship, all sorts of things?

A I never told anybody how to do their job.

Q Well, did you stand by for the purpose if it should arise of telling someone either to do something or not to do something that might cause harm?

A No. It was not our duty. I am a ship's officer. I am not a longshoreman and I never intervene with the longshoremen, how they do their work.

Q You would never be concerned -- let's move out of the port of New York for a moment. Let's say you are in some foreign port --

THE COURT: At the recess both defense counsel suggested that questions be asked of the captain here to

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show whether he had a knowledge of stevedoring practices as distinct from ship's work. Now that is what Mr. Friedman is trying to do, really, to accommodate that. I think we will just maybe shortcut that.

Have you observed stevedoring work at various times in your experience at sea?

THE WITNESS: I have seen a lot of stevedores but I have never been studying it.

MR. KAIN: If your Honor please, and I don't know what the answer will be, but perhaps somebody might ask the captain if he has ever worked as a stevedore or in a stevedoring cargo capacity.

THE COURT: Have you ever done that?

THE WITNESS: No.

THE COURT: I am going to go back, just to save time. If Mr. Friedman asks you questions about stevedoring practice, and I am repeating what I said two or three times before the recess, if on the basis of your observation and experience you can answer his questions, answer them. However, if you can't, don't, because we don't want you to speculate or try to just think things out here on the spot. So you will just be guided by whether you believe you can answer the questions.

Let's go ahead on that basis.

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BY MR. FRIEDMAN:

Q In your training to become a ship's officer, were some of the texts and courses that you studied courses that dealt with stowage and the use of ship's booms and rigs and the kind of loading and discharging equipment here involved?

A Yes, we had books.

Q Did I understand you to say that for a period of time you served on a container ship -- how long was it that you served on the container ship, just one year or more?

A From July, '73, to December, '74.

Q And since then you have not served on any container ships?

A No. At the moment I am on a roll on-roll off ship.

Q I got lost with that.

A Roll on-roll off, which is a modern ship.

Q In any case, serving on a container ship I take it there were numerous ports you went in and out of with containers being loaded and discharged?

A Yes.

MR. FRIEDMAN: May I have the reporter read the question previously discussed?

THE COURT: Yes.

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(Last question read)

MR. FRIEDMAN: The question has to be completed.

Q While the man is still standing on the roof of the container immediately adjacent to the one to be lifted off?

A I have seen it many times, yes.

Q Are you saying it is or is not a proper procedure of unloading cargo?

MR. LEONARD: Objection, your Honor, within the limits of your Honor's own ruling.

THE COURT: He has testified he has seen it many times. To get his opinion as to whether it is proper, I think that's not appropriate.

MR. KAIN: If this line of questioning is going to continue I have an objection to just the word adjacent without indicating adjacent in which direction.

THE COURT: I will sustain the objection to the latter question about whether it is proper.

Q By the way, these containers occupied, if they were actually smack against each other, they would occupy sixteen feet of space across, being eight feet in with each; correct?

A Correct.

Q Now, while the aftend of the number five hatch area was nineteen feet ten inches, which would be the maximum

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distance across, we did agree that a foot or so would be occupied by what is called the stiffeners?

A Yes.

MR. KAIN: If your Honor please, the record will show that the stiffeners are in addition to the nineteen feet.

MR. FRIEDMAN: I will take that answer. If that is Mr. Kain's representation, I will take it.

Q If I understand Mr. Kain correctly, we have the nineteen feet ten inches and the stiffeners do not cut into that?

MR. KAIN: As shown in the plan. That is my understanding.

Q My question to you is, sir, if you put the two containers in two rows, you had space there, did you not, to have one against the outer side of that nineteen feet, one against the inner side of that nineteen feet and you would have approximately or almost four feet, three feet ten inches being available in between the two; correct?

A That's correct.

Q And they could have been lashed down in that manner, leaving indeed, as I happened to draw this when I was sketching this, with an area in between; correct?

A That is correct.

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Q And had it been done in that way, then there would be no inaccessibility of the interior hooking location; all four corners could have been reached without going on top; right?

A I doubt anybody would go on the outside of the containers.

Q Well, even with saving a little space for the outside, even saving or instead of maintaining a three foot path, wouldn't there have been an availability for the hooking in?

I will withdraw it. Excuse me.

A I have never seen anything loaded that way.

Q Excuse me, I withdrew the question.

THE COURT: We can all figure out the dimensions. Have you ever seen anything loaded that way?

THE WITNESS: No, never.

THE COURT: This is really a matter of argument, Mr. Friedman.

MR. FRIEDMAN: Can I just pursue one aspect?

Q You don't have to approach the corner here from the outside, it can be approached from the front or the back of the container and the hook placed, also, can't it?

A If the containers are taken away from each other, yes.

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Q Was there not room on the deck to have lashed these containers in either four separate packages or two by two packages?

A There was, but that is not the way we used to do it at sea.

Q I would like you to look at Exhibit F and tell me, this does show the port side of the Concordia Viking indeed in an offshore position, just as it was on July 12, 1971?

A That is correct.

Q And it is looking towards the aft end, the area of the number four, five hatch area?

A

Q I now pointing, because it is kind of short in perspective, but one sees the portion of the rail that runs along the number four, five hatch area?

A That's correct.

Q And let's see if I can get it down fairly well. Am I now about where we would have the rail alongside the number five hatch area?

A Yes, it's approximately it.

Q That is okay?

A It's approximately. It's a little difficult to see because of the angle of the picture.

Q But this is the general area?

A Yes.

Q I will make an X and actually the rail that we are looking at is itself -- well, you tell us, about how many feet up from the deck?

A The rail?

Q Yes.

A Three and a half feet approximately.

Q So if a man was sixteen feet off the deck area, he was thirteen feet above where I placed the X?

A That's correct.

MR. FRIEDMAN: The record should indicate that was F. X is the point that is thirteen feet lower than the place where Mr. Picinich fell from.

THE COURT: Anything else?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: We had better wind this up soon.

MR. KAIN: I don't have any objection except the X is too big. The top of the bulwark is what I understand it is.

THE COURT: All right.

Q Now, sir, am I correct that entries in a log book you were taught in your training and your schooling and as part of your service to become a ship's officer, entries

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in a log book are extremely important?

A Yes.

Q You are told that that becomes a permanent record and items that are entered in the log book are to be checked as best they can?

A Yes.

Q In this instance you say that before you made any log book entry, before it came time to make a log book entry you were called and told some accident occurred while you were amidships eating breakfast?

A That is correct.

Q Now, I am correct, am I not, and you can get your log book entry out in front of you, if you want, we were told that the log book entry reflects, contains that which you say you learned, you were told in your investigation of this matter after you were first told about it; right?

A That is correct.

Q Now, according to that log book entry, sir, what you learned was that while Mr. Picinich was pulling -- while Mr. Picinich was hooking on top of two containers to hook one, when he lost his balance and fell over the side into the water, he was immediately helped to shore, et cetera; right?

A That's correct.

Q There is no indication in the log book entry as to whether the container that he fell from was the container that was being discharged, being lifted off or one of the other several containers in the same area; correct? No indication in the log book entry; am I correct?

A You are correct.

Q Now, so that which container it was that he fell from, that is going by the entry you made at the time, we simply do not know?

THE COURT: You have asked him that. Let's not repeat.

Q Now, I am asking you, sir, is it your testimony that although your log book entry in no way identifies whether the container that he fell from was the one that was being lifted off, which you told us was already, so to speak, gone from the area when you came to it; right?

A Right.

Q Or any of the other seven in the location, that you made some particular study of the condition and the layout of the other seven containers?

A I did, yes.

Q You remember that?

A I remember that and that is normal routine.

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Q Did you make any inquiry as to which of these eight containers, one of which had been lifted off, which it was he fell from?

A Yes. I was told.

Q But you didn't put it in the log book?

A I didn't.

Q Now, then, am I correct that the log book entry is not a complete and accurate record in regard as to identifying which container the man fell from?

A I have never mentioned any specific container in the log book.

Q Now, you told us that you saw, there came a time when you saw a man down on the pier who appeared to be drenched and being helped or in the company of two other men; right?

A That is correct.

Q And that was at least some distance from where you were standing on ship?

A I was at the moment down on the pier.

Q You were down on the pier then?

A That is correct.

Q How far from him?

A I would say ten to fifteen meters.

Q Well, that is a little more than ten to fifteen

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yards; right?

A Yes.

Q That would be about twelve to seventeen yards?

A Yes.

Q Just so we have the distance. And is the entry that he had no visible injury, that you put in the log book, based upon your vision of Mr. Picinich from that distance?

A No, it is based on what I was told.

Q Now, you were told, you have already indicated to us, whatever it was you were told, by people from the longshoring or stevedoring company?

A Yes.

Q Now, you had occasion, did you not, to know who Tradition Associates, Mr. Samuelson, is an investigating officer for Norwegian shipowners and their representatives here in New York?

A I can't remember that I have heard that name.

Q I am not asking you if you remember names, but let me ask you this: why don't you read this and see if it refreshes your recollection?

Perhaps this should be marked for identification. It's dated July 28, 1971, four-page letter of Tradition Associates.

xxx (Plaintiff's Exhibit 15 marked for identification.)

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Q Let me ask you this: is it your testimony that you did question various crew members or crew members to find out if anybody had seen anything with respect to this accident?

A That is my testimony, yes.

Q And is it your testimony that nobody in the crew knew anything about the man was swimming, what the man did, where he fell from, how it happened; nobody knew anything?

A They knew, yes.

MR. KAIN: Your Honor, please I have an objection. The captain testified he was told in answer to his inquiry from the people he talked to. Not whether anybody in the crew. He couldn't possibly know.

MR. FRIEDMAN: I will have to object to the signal system at one point.

THE COURT: I think the question is a little misleading. I don't think he said that he was told nobody knew anything about anything.

Q You have an entry in the log book, "There were no eyewitnesses from the ship's crew."

A To the accident.

Q That is the exact wording. It doesn't say, "To the accident." It says, "There were no eyewitnesses from

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the ship's crew." Is that correct?

A That is correct.

Q The sentences immediately preceding, just before, you have three sentences. One that says the time of the accident, "While discharging a container at 8:50 a.m., one of the longshoremen fell overboard."

You have another sentence, "He was at the top of two containers to hook one when he lost his balance and fell over the side into the water."

You have another sentence, "He was immediately helped ashore onto the pier and had no visible injury."

Then you have the sentence, "There were no eyewitnesses from the ship's crew."

Let me ask you something: are you now saying that you did have eyewitnesses from the ship's crew to some part of what was described in those three previous sentences?

A There was even a crew member helping the man ashore. But they did not see the accident of when the man fell or how he fell.

Q So there were eyewitnesses --

THE COURT: We are repeating.

What did you mean when you said there were no eyewitnesses?

THE WITNESS: No eyewitnesses who saw the man when

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he fell overboard. But they saw him after he was in the water.

THE COURT: Get this witness completed, please.

C Isn't it the fact that later that very day of the accident, on July 12, 1971, there came aboard the vessel -- I am not going to ask you to remember his name if you don't, but somebody to inquire into the happening on behalf of the shipowner, on behalf of the company, came to you as chief officer to ask you what you knew about the matter?

A Yes.

C And isn't it the fact that on July 12, 1971, on the very day of the accident, you told this investigator that you had received the accident report of McGrath Corporation? And when I say accident report, I show you Exhibit 9 in evidence dated July 12, 1971, containing the description of the accident as there set forth. That you told the investigator on the day of the accident that you had received, reviewed that accident report?

A Yes, I received this.

Q And that indeed that was the source and basis of your information with respect to the happening of this accident?

A No.

Q You had no witnesses from the crew as to the

happening of the accident?

A Not the moment the man fell, nobody saw him.

Q So anything along those lines couldn't have come from the crew?

A No.

Q Who did you talk to about the happening of this accident?

A Oh, various people on board the ship and ashore.

Q Not the longshoremen who made the report?

A I don't know.

Q You have the report?

A I don't know when I got this report.

Q But sometime on July 12, 1971, the day of the accident?

A Probably late.

THE COURT: May I see the report, please?

MR. FRIEDMAN: Certainly, your Honor (handing).

Q Now, you are aware, are you not, that the report of accident by the stevedoring company contains information as to which container the man was standing on at the moment that he fell, from which he fell, that is identified on the stevedoring company's report; right?

A Yes.

Q But omitted from the ship's log entry by you?

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A Yes.

Q What the man was doing at the moment just before the incident of the accident, at the moment just before, is described in the accident report of July 12, 1971, that he and another man, he and a co-worker, were pulling off the lashings from the top of the second tier container; right?

A Yes.

Q And in your log entry you entered a different version to the effect that he was engaged in hooking one of the containers at the moment of the accident; correct?

A Yes. That was his main purpose on the container top, to hook up the containers.

Q Let's get to the next point. In the log entry you entered on the shipping company's log, you stated that he was on top of the container when he lost his balance and fell over the side into the water. And your log entry contains no other or further explanation as to how or why he came to fall; correct?

A That is correct.

Q And the accident report you were shown and given from the stevedoring company on the very day of the accident contains the explanation, does it not, that a container he was on, referring to the two second tier containers,

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and caused him to fall overboard about 35 feet to the water; correct?

A Yes.

Q And that information was omitted from your log entry?

A Yes. Nobody saw that.

Q After you got the accident report of the stevedoring corporation, did you ever go back to the ship's log and make any either supplemental or additional entries? I am not talking about going back and erasing what you reported. Received report, no ship's witnesses, but received report from the longshoreman; did you ever make any such entry?

A No. It's impossible to make an entry in the log for all the papers you receive during a day on the ship.

Q Making an entry as to what was reported as the cause of a man's accident, that wouldn't be a part of appropriate procedures and duties, would it?

Withdrawn. No further questions.

THE COURT: Mr. Kain, do you have anything?

REDIRECT EXAMINATION

BY MR. KAIN:

Q Captain Vangsnes, do you know whether the voyage in question, this voyage which terminated in Hoboken from Damman, Saudi Arabia --

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A I didn't get your question.

Q I say do you know whether during the voyage from Damman, Saudi Arabia to Hoboken, the one which terminated in Hoboken in July of 1971, do you know whether the ship's engineering department salt water ballasted?

A No.

Q You don't know?

A No.

Q Do you know whether it's customary aboard the Concordia Viking to salt water ballast your tanks as you, for example, use your fuel oil, do you salt water ballast or do you know whether that --

A You avoid it as long as you can.

Q Unless it becomes necessary you don't do it?

A No, never.

Q And if you know, Captain, does the shipowner pay the stevedore on the basis of tonnage discharged rather than on a time basis?

A I have no idea.

Q And this ladder, Captain, that you were discussing with Mr. Friedman I think at the forward end of number four hatch on the Concordia Viking, is that a straight vertical ladder?

A That is a straight vertical ladder.

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Q Side rails and runs, steel ladder, straight down?

A Yes.

Q Or does it go at an angle?

A Straight down.

Q That's inside the hatch coaming?

A Inside the hatch coaming.

Q Is it attached to the hatch coaming?

A Yes, all the way down.

Q And do you recall are there any rungs fixed on the inside of the hatch coaming above the ladder itself? Do you understand what I am saying? Above the hatch ladder itself were there any rungs welded to the hatch coaming rather than to side rails of the ladder?

A Yes, there were.

Q Just one more question, Captain.

Can you load containers onto any portion of the deck where there is a stiffener? You can't load containers so the container impinges on top of the -- or any other cargo so it impinges on the stiffener, can you?

A No.

THE COURT: All right.

MR. KAIN: No further questions.

RECROSS EXAMINATION

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BY MR. LEONARD:

Q Can you tell us what was the distance on July 12, 1971, between the forward outboard container and the after outboard container, as indicated on the board by Mr. Friedman?

A I can't say exactly because the distance between each other was different. But something like a foot and a half.

Q In between number five and number three there was a foot and a half distance?

A Oh, yes, something like that. Enough to get the lashings down.

Q Lashings down in between them?

A Yes, down between them.

Q Between the after most outboard container and the after most inboard container, what was the distance?

A Nothing.

Q They were close up against each other?

A Squeezed together.

Q By the way, was the distance between the upper after containers the same as the distance between the lower after containers?

A I would say so, yes.

Q Was the distance between the outboard upper container

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the same as the distance between the outboard lower containers?

A Yes. They were rested on the others underneath.

Q The four corners sat on the four corners?

A Yes. So they were in same position.

Q Is a log entry made on a Norwegian ship, made as events happen, right away, or is it delayed?

A It is made at the moment -- as soon as you can do it. And it has to be done within twelve hours.

Q So that the entries that you made on that day were made simultaneous with the events, as best you could, that you were recording?

A As quick as possible.

MR. LEONARD: No further questions.

THE COURT: You may step down.

MR. FRIEDMAN: With the Court's permission I have some questions.

THE COURT: Mr. Kain, you have your next witness ready?

MR. KAIN: Yes.

THE COURT: We have to wind this up, Mr. Friedman.

RECROSS EXAMINATION

BY MR. FRIEDMAN:

Q I would like you to show me on the log book just

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where this entry is located.

A Right here (indicating).

MR. FRIEDMAN: Does the witness still have the document marked for identification?

Q In the first place doesn't the log book indicate that entry was signed the day after the event? Doesn't the log book indicate that the entry we have been discussing was signed the day after the event?

A This is a scratch log and it hasn't been signed by anybody.

Q What you call the smooth log, which is the same thing written down more neatly, was signed the day after the event?

A The routine is that when the day is over you write this into a smooth log at nighttime sometime and the next morning you show it to the captain for signing.

THE COURT: I think this could have been gone into a long time ago but apparently we didn't. Now, the entry that you were reading from, is that an extract or a translation of the rough log or the smooth log?

THE WITNESS: From the rough log.

MR. FRIEDMAN: He is reading not from a translation but the Norwegian itself.

THE COURT: The translation -- none of us read

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Norwegian so we apparently had a translation yesterday. May I know where it is from?

MR. KAIN: It is my understanding the smooth log is copied from the rough log.

THE COURT: Please, what you produced and marked into evidence was a translation. That was a translation of what?

MR. KAIN: Translation of the rough log.

THE COURT: The book you have before you, which is Exhibit what?

MR. FRIEDMAN: L, your Honor.

THE COURT: Is that the smooth log or rough log?

THE WITNESS: Rough log.

THE COURT: You told me the translation is from the rough log?

MR. KAIN: Yes, your Honor.

THE COURT: That is what you were dealing with this morning?

THE WITNESS: Yes.

THE COURT: When the entry that we are talking about and which Mr. Friedman asked you about, Mr. Kain asked you about, about the accident, I take it you wrote that into the rough log; right?

THE WITNESS: That's correct.

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THE COURT: That is in your writing?

THE WITNESS: Yes.

THE COURT: And it is in Norwegian; right?

THE WITNESS: Yes.

THE COURT: When did you do that writing, what time of day?

THE WITNESS: As soon as possible I could after the accident.

THE COURT: Can you remember approximately what time that was or don't you remember?

THE WITNESS: I don't remember.

THE COURT: Do you remember what day it was?

THE WITNESS: Yes. It says here July 25th.

MR. HELLER: I can't hear the witness, your Honor.

THE COURT: July 12th?

THE WITNESS: Yes.

THE COURT: You wrote it in on the 12th?

THE WITNESS: Yes.

THE COURT: You don't remember when it was?

THE WITNESS: No.

THE COURT: Do you remember whether you wrote that before or after you had received the McGrath accident report which is Exhibit 9?

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THE WITNESS: No.

THE COURT: All right.

BY MR. FRIEDMAN:

Q Do you remember telling the investigator you mentioned before that the longshoremen had told you that the accident had occurred just as it is described in the McGrath accident report?

A I didn't remember talking to that certain man at all.

THE COURT: That has nothing to do with the redirect and recross. I will permit you to go into the time of the log entry because that was raised for the first time by Mr. Leonard. You didn't raise it. And that is all. The time of the log entry and that is it. Anything more on that subject?

Q Before the time of making the log entry did you ask Mr. Olay Hendrickson anything about the happening of this accident?

THE COURT: This is beyond the scope of the redirect and recross. I will not permit it. We have to finish this witness.

Q May I inquire whether you had by that time that you made the log entry, made inquiries to any of the crew members as to their knowledge of the happening of the accident?

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A Yes, I did.

THE COURT: Apparently you don't worry about what I ruled. I told you you can ask about subjects raised on the redirect of Captain Vangsnes by Mr. Kain and the recross by Mr. Leonard. Otherwise you cannot simply start in a new cross examination. The only subject, and I have them listed and there are very few of them.

Q What happened between the time the accident occurred and the log entry was made would be an appropriate item of inquiry.

THE COURT: Bearing on the time? He said he doesn't remember.

MR. FRIEDMAN: Whether he remembers whether it was 3:30 or 3:15, I don't care about that. What I do care about is whatever time he made the log entry did he do A, B or C between the time of the event and the time he made the log.

THE COURT: You are not concerned with the time then?

MR. FRIEDMAN: I am concerned but I don't have to know exactly the time when he made the entry. What I have to be concerned about is what did he do and how he used that time period.

THE COURT: You went through that on cross. You

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could have gone through it up and down.

Let's have the next witness. Get the next witness, Mr. Kain.

You are excused, Captain Vangsnes.

(Witness excused)

MR. FRIEDMAN: May I ask that the witness not leave the courthouse since at the recess there is sometning I would like to take up?

THE COURT: All right.

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W I L L I A M W H E E L E R, called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAIN:

Q Captain Wheeler, what is your present occupation?

A Presently self-employed as a marine surveyor and a marine consultant here in the Port of New York.

Q Would you, Captain, give his Honor and the ladies and gentlemen of the jury a resume of your education, experience and other qualifications for the work that you are now engaged in?

A Graduated high school in 1935. I went to sea as an ordinary seaman for about a year and a half. At the end of that time I was enrolled in the Maritime Commission's Cadet Training Program, which is now known as the United States Merchant Marine Academy. I was graduated from that course of training in 1942 with a third officer's license. I said as a third officer, second officer, chief officer and in 1945 I qualified and passed the examination for master, any ocasion, any tonnage.

I sailed as master from 1945 until 1948. In 1948 I reverted back to chief mate. In 1950 I was

called to active duty with the U.S. Navy during Korea. I served until the end of '51.

I came back to merchant shipping as a chief officer aboard passenger ships. At the end of '52 I came ashore and I worked as a stevedoring superintendent here in New York.

At the end of '55 I went back to sea as master of an American flag merchant vessel, a freight ship. At the end of that period, that voyage, a period of about six months, I came back ashore again and I worked as a marine sueveyor, just as I am doing at the present time.

Q And the period in which you worked as a super-it-endent for John W. McGrath, have you had any other expeience either in connection with your work or in your previous occupations with container facilities?

A Yes, sir.

In 1964 I was sent to Honolulu to suevey and make a report, a study of an -- operational study on the Matson Lines Container Terminals in Honolulu.

Later in 1967 I made a similar extended operational study of the container terminal at Stapleton, Staten Island. It was known formerly as Pier 13, Staten Island.

In my work as surveyor I was accredited by the U.S. Coast Guard, United States Department of Labor,

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to certify,to actually prove test and certify, issue a certificate on the cargo handling gear, including container cranes and container lifting apparatus.

Q Now, Captain, did you at my request prepare two drawings?

A Yes, I did.

MR. KAIN: May I mark these for identification, if your Honor please?

THE COURT: Certainly.

(Defendant's Exhibits P and Q were marked for identification.)

Q Now, Captain Wheeler, willyou look at this drawing which you have prepared and which is marked Defendant's Exhibit Q for identification.

A Yes, sir.

Q And will you tell me, Captain, what that drawing is?

A This drawing is a plan view, might call it a bird's eye view, as if you were above the are looking down on the area.

THE COURT: Just identify it. Let us not show it to the jury yet.

A It is a plan view looking down on the No. 5 hatch area on the Concordia Viking.

Q Is it the Concordia Viking as alongside some particular pier?

A Yes, alongside Pier B, Hoboken, New Jersey.

Q And does that plan view, Captain -- is any portionor was any portion of this done to scale?

A Yes, the structural detail aboard the vessel, the string piece or the apron of the pier, it says of the containers portrayed here and the approximate size of the masthouse was laid off here on a scale.

Q Captain, be sure to keep that around so the jury can't see it.

A This drawing was done on a scale, approximate scale of 0.2 inches to 1 foot. From 2/10 of an inch this paper is equivalent to one foot on a ship.

MR. KAIN: I would like to offer it in evidence.

THE COURT: Any objection?

MR. FRIEDMAN: There is an objection and there certainly has been no foundation laid at this point. And I have never seen it.

THE COURT: I will overrule the objection.

MR.FRIEDMAN: What?

I apologize, your Honor.

THE COURT: Do you have any voir dire?

I believe there is a sufficient foundation from his testimony.

MR. FRIEDMAN: A lot of objections, including that we have never been shown this, notwithstanding the extensive pretrial discovery that your Honor has ordered in this case. And I don't know what's involved. Mr. Kain has even shown it tome at this point in the trial.

MR. KAIN: I haven't had an opportunity to show it to you.

THE COURT: Take a look and see if you have any objections. Then you can ask questions about it on voir dire.

MR. FRIEDMAN: What I was going to suggest, your Honor, since it is a few minutes to the hour, not to waste the time, but if other things can be consumed in the next seven or eight minutes I am willing to stay here at the luncheon recess, we can go over this together and possibly have an explanation of it. Just to look down at it and go forward is not the appropriate procedure. I am not trying to raise formalistic objections.

MR. KAIN: I have another one. May I continue with this.

THE COURT: Get him to identify it on the drawing.

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Q Captain, will you look at this drawing which is marked as Defendant's Exhibit P for identification and will you tell me, first of all, Captain, when did you make these drawings?

A I believe it was last Saturday afternoon and Sunday morning.

Q Could you tell me, Captain --

A I am sorry, Monday. It was Sunday afternoon and Monday morning.

Q Could you tell me, Captain, what is depicted, and don't show it to the jury --

MR. FRIEDMAN: I can save time.

When I look at it I will see what is depicted and I will agree if I can. We don't need Mr. Wheeler's testimony to see what's depicted. I am trying to save time.

THE COURT: We are not saving time. We badly needed some pictures all through the time. I am going to let pictures in unless they areso inaccurate that they will confuse the jury.

If you have some voir dire, go ahead and ask it. Otherwise I will admit these exhibits and procedure.

MR. FRIEDMAN: If I could get shown them I could speed the trial along to stipulate.

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THE COURT: Pas it down and show it to Mr. Friedman.

MR. KAIN: At some point, if your Honor please, may I ask the captain what is depicted in the drawing he made?

THE COURT: Ask him right now.

THE WITNESS: It is an elevation view, as if one was standing on the stern of the Concordia Viking looking forward towards No. 5 hatch. It shows the booms, the gear, the deck house, the hatch coaming and the containers on the Pier B starboard sides.

Q Does it show a housefall rig?

A It does show a housefall arranged for the purpose of discharging the containers.

Q Does it contain the plane of the fall?

A It does contain the plane of the falls.

Q And will you tell me, Captain, what, if any, portion of Defendant's Exhibit P for identification, which is the second diagram which you were shown, what, if any, portion of that is drawn to scale?

A Again, the structural details of the vessel. Everything, every bit of information I had available to me was placed on that plan to scale, to the scale as the previous drawing, point 2/10 of an inch to 1 foot.

Q Have you looked at the general arrangement plan of the Corcordia Viking?

A Yes.

Q Have you determined what the scale is on that?

A Yes.

Q What is it?

A The scale on this plan, the general arrangement plan showing both a side elevation view of the vessel as well as some plan views of the various levels down through the ship, the scale of this plan is 200 to 1. It makes no difference whether you use inches, meters, feet, miles. One unit on this plan is 200 units in reality aboard the ship.

THE COURT: What next, Mr. Kain?

MR. KAIN: I had intended to proceed with these drawings.

MR. FRIEDMAN: Your Honor will have to hear argument on it.

THE COURT: We will adjourn for lunch. The jury can go out.

(Jury leaves.)

THE COURT: Yes.

MR. FRIEDMAN: Your Honor, it is not enough, in dealing with these kinds of exhibits, Q and P, to be

content that they are A, pretty, and B, do shed light on the general condition and structure and shape of the ship. What is most important is to focus, as the trial does at this point certainly, on the sort of critical and sometimes what would otherwise be regarded as trivial details but on which a case can hing an which indeed we have been focusing on quite appropriately.

I say to the Court, and I don't propose to be a master in stevedoring, that when the Court will see, and maybe if I can stand over there and project my voice so I can be heard and the Court can also see the documents, I will come to the first one, Q.

Now, in Q, your Honor, and I know your Honor has some experience in this field, and as indeed is also shown from P, the other view, we have the boom and then what is called the spotting of the boom, which is the plumb line drawn from the top of the boom down right over whatwe have been calling the No. 3, which he has decided to call the No. 4 or 2 box on the drawing, which is to say the outboard one. It is, of course, the inboard one. He has called No. 1, 3, what we have calledon the blackboard as No. 4, that was listed at the time of the happening of this accident. There is no evidence to any other effect.

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The inboard was lifted, the outboard was the one on which he was standing and from which he fell.

So they have, and I at least heard no testimony otherwise, that this boom was spotted over the outboard container. I had heard the testimony to the effect that it was spotted over the inboard container.

Now, you have a whole line. Indeed when you look at P you can see where this is going, from the point of view of the critical issue, the detailed issues in this case. A line, that if it was spotted over the outboard container and they lifted off the inboard container, that this swing, and I am not sure where that is going to lead them in terms of liability, but I am not going to be advocate to lay a mousetrap, but if it is not correct and in accordance with the evidence then it shouldn't go in.

One might think that they have almost described why it got bumped but maybe they have reasons for their own for proceeding in that direction. But the point is it is not in accordance with the testimony on a very specific point of the case.

Another aspect, a detail but a critical hinge of the case. Your Honor will notice, if you look hard at P, the way to a visual image to see a tipping outboard of the four containers, every one of them is tipped outboard

on this drawing. What evidence supports a single diagram going to the jury that says that all of these were tipped outboard? Your Honor has heard a multitude of testimony that there was dunnage and put in a position by which they were left.

THE COURT: I haven't heard a multitude of testimony to that effect. I have heard testimony that there was a camber on the vessel and I think I have heard the testimony of this chief officer that normally in his experience the dunnage is put underneath not to do anything about the camber but simply to do other things, whatever it is.

And he testified that that might produce some gap in the upper level of the containers which they would take care of by further dunnage.

Now, there may be testimony from Captain Ash, and I think there was, that normally one would compensate for the camber. But that's your witness and he is, after all, an expert and he was never, to my knowledge, on this ship.

So we do have enough evidence on that point to at least permit the defendant's expert to come in with this drawing, as far as that feature.

Now, I am puzzled, Mr. Kain, about the boom.

MR. FRIEDMAN: I would like to be heard on the

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camber. I accept everything your Honor has said, that there is a division of testimony and the defendant isn't, of course, bound by what we say. But accepting that there is some evidence or at least there is no proof on their part, acceptance on their part that they did offset the camber, what they have done here is, A, not offset the camber; B, driven in dunnage as a wedge to further accentuate the outboard angle of the container. In other words, they haven't accepted the idea, at least they say they offset that by saying we put some dunnage. They have turned it around. They have driven dunnage over here to accentuate the outboard role. I am just saying that the picture has a dramatic impoact on the issues of this case.

THE COURT: I don't think it is all dramatic. I could not see any valid objection to the depiction here of those four containers. It is possible that the pencil representation of some dunnage at the top should be removed. I don't recall any actual testimony, and I don't think that is a big problem. I am concerned about the boom.

MR. KAIN: All I am trying to point out to your Honor is what I did this for.

Item 1, I could send Captain Wheeler to the blackboard and I could do as Mr. Friedman did.

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But in order to make this with some degree of accuracy with as much detail as possible, he did it at home. It is not being offered for the idea of showing this to the jury and saying, look, here is just the way it happened. I intend to put Captain Wheeler on the stand. I intend to ask him his opinion about how dunnage is put on, based on what the captain said, and dunnage in between and based on what the captain said, 10-ton booms, 2-ton containers and I specifically recall and I made a specific point in spite of your Honor's recollection and asked Captain Vangnses, if he put anything or did anything about this and he said aft we put the cross containers on we throw in a piece of dunnage before we tighten down on it.

I submit, your Honor, in the context of what I am using this with Captain Wheeler, I am entitled to ask Captain Wheeler in his opinion how would you compensate, if necessary, for the space between these two, if Captain Wheeler says in my opinion you should use a piece of dunnage, I can do this by having Captain Wheeler certainly stand at the board and sketch it. I have done it ahead of time for the purpose of asking Captain Wheeler various questions based on my defense so he can illustrate what he is talking about.

THE COURT: I don't really have a lot of

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problems. What are you going to illustrate with the position of the 10-foot boom as it is in these drawings?

MR. KAIN: The 10-ton boom, it illustrates, at least I hope it does, the position here -- in other words, you see where it is here --

MR. LEONARD: Let him see both of them at the same time.

MR. KAIN: This is the position of a boom. In this case the only boom actually in use, the port boom at No. 5 hatch. I am entitled to ask Captain Wheeler, and I don't recall precisely what the plaintiff -- as a matter of fact I think I got something very vague from the plaintiff and his fact witness and Mr. Langan said it should be spotted directly over this. I certainly am entitled to ask Captain Wheeler, in your opinion where should it be spotted? If Captain Wheeler says in my opinion it should be spotted in the middle of this container in this position, I certainly would be entitled to illustrate it on the blackboard. Then I am entitled to ask him in your opinion, Captain, why sould it be spotted as depicted in this diagram immediately over this container? That's what I am going to anticipate. And would you say that in your opinion is where it should be spotted?

THE WITNESS: Yes.

MR. KAIN: That is the reason.

MR. LEONARD: In the event that the positioning of the head of the boom in either of these diagrams is, one, not in accordance with the testtimony. Certainly the plaintiff has an opportunity to cross examine the witness on that basis.

Two, if the positioning of the head of the boom is incorrect and somehow causes a material change in the offer of these documents, then, again, the plaintiff can cross examine the captain on that. But if it is immaterial and the captain so testifies, as to whether the position of the head of the boom is here or here or here, various portions, then I submit this is very illustrative for the jury's understanding.

THE COURT: I think your memory of the testimony accords with mine, about the position of the boom. I really couldn't put all those incidences together, but to the extent there is testimony I get the impression this was over the center.

There is no testimony in the record, and I think you realize that, Mr. Kain, that the boom was in the position shown on this drawing.

MR. KAIN: That is my recollection there is no testimony as to specifically where it was.

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THE COURT: I think you have clarified the purpose for which this is being offered and I don't see any valid objection to that, again as long as the jury is made to know exactly what it representes and what it doesn't represent. That's where we stand.

I think that I will admit it with instructions to the jury, which I hope I can remember our conversation now, to give them some guidance, and the testimony of Captain Wheeler will make clear as we go along what it is and what it isn't. I don't see any problem.

MR. KAIN: I don't see how it differs in any way from what Mr. Friedman has done here with the blackboard.

THE COURT: I will admit the exhibit for the purpose that it is to be used in testimony, in connection with the testimony.

MR. KAIN: If your Honor recalls, and I think your Honor called attention that some of this stuff goes over the jury's head. You can't put a container in this way by the cargo doors.

THE COURT: I don't blame Mr. Friedman in worrying about this when it was just presented to him. The witness testified this was a scale drawing of certain facts. So we were all sitting here and didn't understand

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it. I think with the understanding we have now we will proceed.

MR. FRIEDMAN: Your Honor is going to instruct the jury when they come back at 2:15?

THE COURT: Yes. If you want to add anything you can just call me.

MR. KAIN: When we come back we will mark it in evidence.

THE COURT: We will take care of that.

I cut you off on Vangsnes.

I tell you our time problem is very severe. I think we are all in a bind if this trial goes over until Monday. It just can't be done.

MR. FRIEDMAN: We have information, as your Honor recalls, you directed the information to turn over their investigators' reports. From the reports we learned, that is to say their investigative reports, that there was questioning aboard the ship at a later date by the investigators and they learned that there were four men with knowledge as to the happening of the accident, two of which who actually saw the man in flight, as well as others who saw him leaving the boat and hitting the water.

My line of questioning was to the effect whether the chief officer questioned those particular men before

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he made the final log entry and during that time period.

THE COURT: I don't want to get technical and I wouldn't normally be at all technical about the scope of cross or recross, Mr. Friedman, but I think the case has dragged considerably for a lot of reasons and we have reached the point where I really felt that I had to insist that we not open up your examination into what you should have covered on cross.

Now, that whole body of material which was very, very interesting, I must say, about comparing the log with the accident report, but I haveno idea. Maybe there was a lot more to it.

MR. FRIEDMAN: My application is withdrawn on the record and any objection that I made I hereby withdraw.

THE COURT: All right.

(Luncheon recess.)

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AFTERNOON SESSION

2:15 p.m.

(In open court; jury present.)

W I L L I A M W H E E L E R, resumed.

THE COURT: Now, we had a discussion after we recessed about these two drawings, and I think we understand a little better about them.

As I understand it, and you correct me if I am wrong, Mr. Kain, but you have had Captain Wheeler make these drawings to illustrate to some extent-- for instance, I gather, about the structure of the ship, deckhouse and where hatches are and bulwarks are. That is to scale, Captain, from ship plans; right?

THE WITNESS: Right.

THE COURT: Now, there are other features of these drawings. For instance, in both of them you will see, ladies and gentlemen, the boom at No. 5 hatch is in a particular position. There is a picture of 4 containers sitting on the deck and they are in a particular position.

This is done to illustrate, and so it will be abundantly clear, some points which Captain Wheeler will testify about. It may not be related to any evidence in this case as to what actually happened. He may

testify as to what or could have happened under different circumstances. So I think the jury should be careful, and the lawyers have no other intention but to use these drawings in a way that will be clear.

To some extent they represent actual features, to some extent they illustrate maybe hypothetical points, just the way the diagram was used on the blackboard. So you just listen to the testimony and I don't think there will be any confusion about it.

Proceed.

MR. KAIN: If your Honor please, because of the way of the blackboard, I would normally try to suspend this. May I ineffect rig something for that purpose?

THE COURT: Yes. Exhibits P and Q are received under the circumstances I have just described.

x (Defendant's Exhibits P and Q were received in evidence.)

THE COURT: Are you going to have the exhibits facing the jury there?

MR. KAIN: Yes.

THE COURT: I will come down so I can see.

MR. KAIN: There are a few matter I would like to cover, your Honor, before I get to that.

THE COURT: All right.

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DIRECT EXAMINATION (Continued)

BY MR. KAIN:

Q Now, Captain, based on your experience, both as a ship's officer and as a stevedore superintendent, is a list ever purposely put on a ship in order to facilitate either loading or discharging?

A Not in my experience have we ever purposely listed a ship. I believe it would hinder the normal routine stevedoring operation.

THE COURT: Are you going to put up the drawing now?

MR. KAIN: Yes, I am, Uudge.

May I, if your Honor please, so I can see it from a distance, go outside the rail?

THE COURT: Yes, anything you want to do.

Q Now, Captain, before I mention anything about the particular drawing, have you actually worked at Pier B, Hoboken?

A Yes, sir, I have.

Q And for what period of time and under what circumstances?

A From 1950 to 1955 the American Export Lines Steamship Company operated Piers A, B and C of a terminal operation. For those five years my firm,

and at that time I was in partners with another man, an engineer, our firm name being Burn, Wheeler & Company, we were retained to assist the American Export Lines with the operation of that terminal for thatperiod, 1950 to 1955.

In '55 the stevedore contract was turned over to a stevedoring terminal opertaor.

Q Now, Captain, just one item on there. Are you familiar with the width of the cargo doors in the pier shed of Pier B?

A Yes, 18 feet high and about 18 feet wide.

Q And would you tell his Honor and the ladies and gentlemen of the jury what is meant by a cargo door?

A A cargo door is the large overhead rolling-type door that is opened up for large packages of cargo to pass into the shed on the pier from the string piece, after having been taken off the ship. And the reverse for loading.

Q Now, Captain, looking at your diagram, and I direct your attention between the pier itself and the starboard side of the ship as depicted in that diagram, do you see something in therebetween the ship and the pier?

A Yes, sir.

Q And what do you call that?

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A This I have labelled for clarity a fender float. It is like a woodenraft that floats on the water. It is attached by lines to the pier and it sort of rests the ship off the pier, keeps the ship from going right alongside the pier so you can have sufficient space between the shed of the pier and the side of the ship. This is called a camel.

Q Now, Captain, again directing your attention to the diagram, which is Defendant's Exhibit P in evidence, would you point out, referring to the diagram, where the guys are rigged for the port boom?

A The guy is rigged from the head of the port boom -- this is the port side boom, 10-ton boom, and it is rigged down to the t-p of the port side boom and it is tensioned by rope tackles, block and tackle.
The wire of the guy is adjusted so that the lateral strain that is going to be pulling this boom inshore as you transfer a container from here to the dock, the lateral strain is going to be resisted by the guy.

Q Are those depicted on that diagram?

A Yes. I have drawn it in very lightly.
This is a line drawing. It is sort of a schematic drawing, just lines of the line of the guy, the plane of the guy would be as this light pencil line comes down here and

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I have it labeled guy and preventer.

Q Again, referring to your diagram, and I direct your attention to the container stowage depicted on the port side, have you made any, can I call it, exaggeration in that depiction to allow for showing on there the insertion of dunnage?

A Yes. It is a line rig bitt it is sort of based out. You can actually see air spaces in here between them where the dunnage would be applied in the horizontal plane and there would be dunnage under the containers and dunnage for blocking or chocking in between, if needed, when they are placed. There is chocking between the rail and the container and the hatch coaming and the container. And the chocking is nailed to the dunnage that is underneath the container that is being held in place by the very weight of the container. You can't nail this chocking to the steel deck. You have to have something to nail it to, which is dunnage underneath.

Q Is the camber of the deck depicted in that diagram, Captain?

A Yes, sir, there is.

Q Would you point out on the diagram how you have depicted the camber of the deck?

A The camber is a gentle arc going across.

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The deck is laid in an arc, a shallow arc. If that deck, as I have drawn it here on the diagram, was exactly level when the ship was on an even keel, the deck would pass through this line. So the distance from this line up to the actual deck is described as the camber of the deck.

On a ship of this type it is around 16 inches. The deck at the center line is 16 inches higher than the deck at the keel when the ship is on even keel.

Q Did you at any request compute 16 inches of camber from the general arrangement plan of the ship?

A Yes, I did. It is shown on the side elevation of the general arrangement plan.

Q Is that 16 inches, that is from the center line of the ship to either the port or the starboard side?

A That is correct.

Q Now, does your drawing, as you have it there, show or depict any leveling of these containers by use of dunnage to allow for camber?

A No, it doesn't. We have simply put one wooden plank of dunnage. It is one inch plank, 8 inches wide, 12 to 14 feet long. We have simply put the dunnage on the deck, put the empty container on the dunnage in such a manner that the corner castings bear on the dunnage.

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THE COURT: Dunnage is one inch thick?

THE WITNESS: Approximately one inch thick, about 8 inches wide for this purpose and about 12 to 14-foot long. You have a photograph here showing some of the dunnage.

THE COURT: What did you say about the dunnage in relation to the camber?

Did you ask him about that?

MR. KAIN: I asked him if his drawing depicted the use of dunnage to level or to level the containers.

THE COURT: What was your answer?

THE WITNESS: My answer was no dunnage was used on this plane to build up the outboard side of the container so that it would be level, so that it would compensate for the cambered deck. You want to retain the camber so that water, rain drains off the top of the container. It is preferable to maintain the camber of the deck for drainage purposes.

Q Let me ask you, Captain, have you made any, shall I call it, intentional distortion in that diagram to depict or to bring into focus the effect of stowing these containers in this fashion insofar as a possible space between?

A Yes,I have made such an exaggeration. I left a space at the bottom and I have left an increased space

at the top of the bottom container. If you notice, the bottom of the top container comes together again because there is dunnage inserted there and the top containers are resting in such a manner that the bottom is to the other, with a piece of wood in between, and the top is further apart to accommodate the camber of the deck.

Q Now, Captain, again referring to your diagram -- before I do that, let me ask you, what is your definition, Captain, of hardwood as used in the stevedoring trade?

A Hardwood in the shipping business and in the lumber business also is a hard wooded wood that comes from a non carniverous tree. If we don't want odors of pine contaminating any general cargo that we used to cargo on ships, deodoratnt of pine.

The odor of pine could contaminate tea or coffee. So we use hard dunnage, such as oak, ash, wood of that nature.

Q You never use soft wood?

A Never. That comes from a species of pine. You don't use that.

Q Captain, again referring to your diagram, first of all will you tell me what you mean by the plane of the falls? Before you do that, Captain, I will ask Mr. Fleming to hold the other one up.

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A On Exhibit P, the one posted up here, any plane is established by three points that are not in the same straight line. So we have a point at the span block on the house fall, we have a point at the engine block on the boom, and we have a point at the junction of the falls, wherever that fall draft may be at that time. So that is the plane of thefalls. It extends vertically thorugh the head of the two booms.

The third point will be anywhere within or along that plane because of gravity pulling it down and depending on the manipulation of the winch. When it is picked it is over here. When this one is transferred to this point, the third point is here. When this container is transferred to that position the third point is here. When it is landed on the dock the third point is here (indicating).

Q Is the plane of the falls depicted in Defendant's Exhibit Q?

A Yes, sir. It is labelled here, this red line that I have running from the same point on the span block on the pier, to the head of the boom, and the third point is always somewhere along this line down below. This is a plan view.

Q Now, incidentally, Captain, while I have

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Mr. Fleming holding Defendant's Exhibit Q, that boom is, as shown there, spotted to plumb the upboard container?

A The plumb is the geometric center of the outboard after container.

Q On Defendant's Exhibit P, the other plan view, is it also drawn to show the port boom plumbing the upboard after container, in other words, the same position?

A Yes. The head of the boom is over the geometric center of this container labelled on this diagram.

Q Now, again referring to your diagram, Captain, will you tell me what is mean by half of the draft as compared to the plane of the falls?

A The plane of the falls, the third point as I showed, was the junction of the falls. That is the point from which the container is suspended. The container is suspended from a single point accommodated by the legs of the bridle. Hooked into the four corners but suspended from a single point.

On the other sketch, this would be the plane of the falls as I have drawn it here. When you hook into this container, the first one to go ashore from this side, you would hook into the four corners. This container is 20 feet long. The path of the draft would be a 20-foot wide path going over the top. Or if the container

was picked here and then swung around, the container path, the path of the draft then would be an 8-foot draft.

Q Now, Captain, with respect to the diagram you are looking at, Defendant's Exhibit P in evidence, you have, if I read it accurately from this distance, you have drawn certain angles at various points across the ship which I take it indicate the junction of the falls; is that correct?

A That is right.

Q Would you indicate to his Honor and the ladies and gentlemen of the jury where you would put those?

A These little dotted lines on each position; this is 1-A. That same container passes through these positions, 1-A, 1-B, 1-C. When it is at position 1-A, the falls that are supporting it, this one runs up to the head of this boom, this one up to the head of the span block on the pier. When it is in this position this arrow points to the head of this boom. I didn't draw these lines in because it would be confusing. So you will just have to imagine the line of force between the head of the boom, the junction of the falls, the span block. These are represented by these small arrows on each of these positions.

Q Captain, the internal runner angles as indicated

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there, did you compute those internal runner angles using the port boom in the fixed position as shown there?

A As shown here, yes.

Q And with respect to the draft how did you compute it?

A I drew the draft in a position that when it was lifted from its place of rest here initially on top of No. 3 container, it was picked up and it would be moved laterally by manipulation of the winch operator who stands right here behind this position of the container up on top of the deck house and he can manipulate or slack off on the one from the boom and heave ahead on the one from the pier and he can transport this container right over to the dock, passing through these positions. At the moment it passed through this position, at that level you wouldn't want to raise it any higher. The internal runner angle here would be 107. That's a tolerable amount of angle.

At the time he went through this position it would be 99. Down here 71. When he picked it up it would be 85.

Q Captain, if I can use the expression, when you computed those internal runner angles as shown on your plan, at what level did you have the draft passing across the deck?

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the deck?

A Slightly over 8 feet above the deck, above the main deck. At the same relative position at which it was towed. Maybe two inches higher. You don't even have to pick it up. Set tight on this fall, heave ahead on this fall. This fall then moves in an arc. As you heave on this fall, this fall would move at an arc, up and away from the stowage.

Q Now, Captain, will you envisage, using that diagram, if you can, to explain it, will you assume that the head of the boom, instead of being spotted as depicted there, is spotted so that it plumbs the inshore rather than the offshore, which I think you have labelled No. 1 container --

A That's right.

Q -- if it plumbs that, using this gear at this hatch -- incidentaly, what does the plan show are the boom capacities at No. 5 hatch?

A Capacity of the boom, I lifted it off the plan, this is a 10-ton boom.

Q And what are the winch capacities?

A The winch capacities, off the plan again, is 5 ton in double gear and 3 ton in single gear.

Q And what id meant by double gear, Captain?

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A Single gear you can pick a lighter draft, 3-ton draft, at a faster speed. In double gear you can pick a heavier draft at a slower speed. You sacrifice speed for weight.

Q Will you assume, Captain, that the boom, instead of depicted there as now plumbing No. container --

A The head of this boom would be 8 feet, 8 feet in.

Q Will you also assume that the No. 1 container has been lifted -- first of all, can it be lifted if the boom is plumbing the No. 1 container with this gear, these winch and boom capacities, can you lift a 2-ton container directly?

A Yes, sir. You could lift the container right up to the head of the boom or the junction of the sling, this shackle here on the sling, could be lifted right up.

Q Will you assume, Captain, that plumbing on one container, the No. 1 container has been raised to a position 8 feet higher than it is depicted on your plan, would it be possible, without taking the path of the draft -- in other words, moving it directly across as you depict it there 8 feet high -- would it be possible to move that container, Burton it across the ship and put it on the pier?

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A Not with a 3-ton winch. You would have to have a stronger winch,and it would create excessive strains, in the guy and preventer. As we lifted this container up 8 feet, the bottom of the container would be up where the top of the container. This angle would necessarily be up the same distance and you would have a flatter angle going across the deck. It takes more horsepower to transfer that container across the deck at a flat angle. If it is a real flat angle, up around 170 degrees, it takes 11 times the weight of the container in order to transport it across the deck. It takes a winch with 11 times -- with power 11 times the weight of the container to do it. It would be impossible, in other words, to do it.

Q Would it be impossible to do it if the winch was in a double gear?

A With a 5-ton winch you could go higher without being limited by the power of the winch but the strengtn of the guy and preventer is constant. You wouldn't want to do it. It would be a dangerous operation.

Q You have depicted on that plan, the last position of the container you have over the pier; is that right?

A Yes, position 1-C.

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Q Why do you show position 1-C differently than you have shown the other positions?

A Because the container has to be brought into the shed of the pier, to be stowed away, taken out of the way. You could bring it along in the direction of the string piece but then you would interfere with the other three gangs working on that main string piece. You would have a traffic jam. Swing the container around and you bring it in through the 18-foot wide door in its long dimension and stow it away.

Q That is the customary or was the customary procedure at Pier B when you worked there?

A Yes, with containers.

Q Captain, again referring to that diagram, again on the pier side, does that diagram show what type of a structure or view depicted in any way what type of structure block for the house fall?

A Yes, the span block or the house fall block is depicted up here. I have it labeled "block". That means a pulley shaped object. The structure of the pier is like a schematic diagram here. Pier B is a double level pier. This is the deck of the pier on which the work goes on. This is the deck of the second level, the second story. It is about 20 feet high between the second story and

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the ground level. The upper level is about 20 feet high too. This is from my recollection of the area. This is a steel structure, row of heavy steel girders that go up and extend beyond the roof line and they are buttressed or supported by heavy steel beams to resist a lateral force being exerted on them in the osshore direction.

Q Could you tell me, based on your experience at Pier B, the approximate amount of time it takes a longshore gang to rig to a house fall, when the block and house fall is in that position? There may be different features with different booms but is there an approximation you can give us?

MR. FRIEDMAN: I object on the grounds it is irrelevant. What relevance does it have?

MR. KAIN: There has been a lot of talk, your Honor, and I believe the plaintiff and his fact witnesses said they started to work about five after eight. There is a time sequence which Mr. Langan referred to and I am trying to get approximate times for the various procedures.

MR. FRIEDMAN: I put in evidence a daily activity sheet and a log book that shows just what the hours and times are. It is all in as to what was going

on, just what hatches were being worked on ... deck at 8:50 a.m.

MR. KAIN: If there was an activity sheet that says how long it took to rig, I would be happy to accept it.

MR. LEONARD: We have it in evidence.

THE COURT: Needless to say I can't waste time.

MR. KAIN: I will withdraw the question, your Honor.

Q Now, Captain, for the moment, I don't think I have any more questions referring to this plan. Are you through with both plans for the moment?

MR. KAIN: Yes.

Q Now, captain, you have been in the courtroom and sat through most of this trial, have you not?

A Yes, sir, I have.

Q Will you assume with me that the containers we are talking about here were loaded in Damman, Saudi Arabia on the 29th of May, 1971 and that the loading was completed some time approximately 2 o'clock in the morning. The ship thereafter sailed some time approximating 4 a.m. in the morning and that the crew -- there has been testimony that the crew did some securing of these containers while the containers were still being loaded and thereafter they worked until approximately 5 p.m. securing these

containers that were carried as deck cargo, these 76 containers.

Now, tell me, Captain, based on your experience both as a ship's officer and a superintendent of stevedoring, do the, in thiscase, wire lashings, turnbuckles and chocking, as depicted on your diagram, play any part in the loading operation?

A In the loading operation?

Q Yes.

A No, they don't play any part in the loading of the containers or any other cargo.

Q And do they play any part, do they have any function with respect to the discharging operation at Pier B in Hoboken?

A None whatsoever.

Q And what is the purpose of these lashings?

A The lashings are functional when the ship goes out to sea and gets out onto the ocean where the waves, wind and the ship is working, even though it weighs 13,000 tons, the energy in the ocean causes the ship to roll, that is when the lashings of any cargo becomes functional.

Q Is the same thing true, Captain, of the chocking as depicted in your diagram that we have referred

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to?

A Yes. That is why this chocking has to be nailed down. If we ship sea over the wall, it would sweep it away. You can't nail it to the steel deck.

THE COURT: I was interrupted. I have to have the last couple of questions and answers read.

(Record read.)

Q Captain, referring to the deck cargo, the ship's cargo in general and more specifically to 20 by 8 by 8 containers carried as deck cargo, is there more than one acceptable way to secure such containers?

A Oh, yes. Several ways to secure containers.

Q Assuming, Captain, that the Concordia Viking had been fitted with deck fittings and carried stacking plates and carried pre-measured lashings, Peck & Hale gear or the brands, would that have been an acceptable method to transport these containers?

A Yes, that could be used.

Q And in your opinion is the method described to you and which is depicted in the stowage of containers in the diagrams which you have made, is that, in your opinion, a good and proper and seaman like way to transport these containers?

A Yes, sir, it is.

Q Now, Captain, assuming dunnage between a double stow of containers as depicted in your diagram and also assuming, Captain, dunnage, a single piece of dunnage to have been laid underneath the corner castings on the bottom containers, what is the purpose, if any, in inserting this dunnage in this type of stowage?

A To insure -- primary purpose, to increase the co-efficient of friction between the container and the steel deck. Steel on steel has a lower coefficient of friction, slides more readily. Wood on steel or a piece of wood sandwiched between two steel surfaces will increase that co-efficient of friction and make it harder to slide, more difficult. It would require greater force for it to slide.

Q Now, Captain,assuming, again the type of stowage you have heard described here, that is, the dunnage underneath the lower containers and inserted between the upper and lower containers, lashing wires going through the corner castings and secured to padeyes or staples on deck by means of 1 by 18 turning buckles, can you tell me approximately how much force one man could exert by tightening one of these turnbuckles, let us say, with a 3-foot bar or a long Marlon Spike, something of that sort?

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A Yes. Such a turnbuckle is a double screwed device. That is 8 threads to the inch on that turnbuckle. It is possible for one man to generate a force, a pulling together force of up to 12 ton, depending on how much bodily effort he exerts through the lever, through the 2-1/2, 3-foot lever.

Q And would you expect this considerable force which you have described, Captain, to have any effect on the tonnage inserted in the stowage depicted on your diagrams?

A Yes, it would. The bottom or the resting points -- remember, the entire weight of the container is resting on the 4 corner castings, about 6 inches by 6 inches, so you have concentrated weight already just by the weight of the container, concentrated over these four 6-inch squares. When you pass the lashings and pull them down, clamp them down you generate an additional 8 ton, let's say, because of the angle of the lashing. That would give you a resultant force of 10 tons on each container clamping it down.

The imprint of the bottom of the container, the corner post of the top one and the bottom one, the corner castings would be embedded in the one inch board up to about between 3/16 and a quarter inch.

Q That would depend on the particular type of

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wood, I assume, that the dunnage was composed of?

A Yes. That is right, dryness of the wood, moisture content, whatever.

Q Now, Captain, assuming that a 20 by 8 by 8 container such as we have been talking about, can you give me a range of weight, assuming the empty container two tons, can you give me a range of weight that you would expect a fully laden 20 by 8 by 8, usual type of 20-foot container, has a maximum load, the gross weight being 22 ton? So it can carry about 20 tons of cargo. The net weight would be 20 tons. The tare weight would be two tons. The gross weight is 22 ton.

Q Does this vary slightly depending on the type of containers, in other words, as to whether it is plywood, fiberglass, steel, aluminum?

A It depends on the manner that the bottom of the container, the truss work, the bearing, the weight-bearing structure of the container is designed. It is designed to be in the range to support 18 to 20 tons. The upper part of the container is merely a weather proofing, to keep water off, keep the container dry. Men can walk on top of it but you can't put any weight on top of it. You can't pass lashings and squeeze it down because the lashings would cut through the top of a container, just like the top of a

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truck or the top of an automobile.

Q Captain, would you expect that the weight or the approximate weight of a fully laden container, if I may use the weight capacity, it would vary slightly, as I have just asked you, for the various types of containers?

A Yes, it would.

Q And if I understood what else you said there, you would expect that the bottom of the container would be much more sturdily built or constructed than the top of the container?

A That's right.

Q Now,using the ship's cargo gear as shown on the ship's plan at No. 5 hatch of the Concordia Viking, would it be possible to handle the load or discharge, using only the ship's gear, a fully laden container?

A No, sir. It is impossible. You don't have the power to lift 20 tons.

Q Would it be possible to lift the container depicted on the board there as No. 7, which I think the captain testified, according to his cargo stowage plan, weighed 5 tons?

A Yes, sir, it would be possible. You do have the power to lift a 5-ton load.

Q Now, Captain, assuming the type of hooks, this

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4-legged bridle, and you heard a description of this, did you?

A Yes, sir.

Q Now, assuming a 4-legged bridle, would a rig such as this be used to lift a container that was fully laden?

A No, sir.

THE COURT: Mr. Kain, I don't understand what we are doing with asking questions about 20-ton fully loaded containers. I really have to save time here.

Q Captain, you talk about a 2-ton container, the type you referred to, did you make some wooden blocks?

A Yes, sir, I did.

MR. KAIN: I want to illustrate a principle, your Honor. May I mark them?

MR.FRIEDMAN: Does this have to do with the condition of the bottom containers and how they were chocked?

MR. KAIN: No.

Is there an objection to it? I am only using them to illustrate what I am talking about.

MR. FRIEDMAN: No.

THE COURT: Go right ahead.

Q Using what you have here can you simulate a 4-legged bridle with a cargo fall?

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A Yes. I have used some stiff wire to represent the flexible wire that is used in a 4-legged wire and I have put some holes in a block of wood to represent where its contact connected to the container and a container suspended on a 4-legged bridle would be nearly as you see this block of wood suspended. These vertical lines on the corner of the container represent the 4-corner posts of the container.

Q And assuming, Captain, that the head of the boom is where your right hand is --

MR.FRIEDMAN: Is that what the captain testifies would be the fair representation for the circumstances of this case? Because he can move his thumb pretty easily. Why can't we get a holding that is a fair simulation in Mr. Wheeler's opinion.

Is that a fair representation?

THE WITNESS: If I can hold my thumb steady it would be a fair representation.

Q Assuming this thumb is the head of the boom, if you will, assume it is plumb directly over this container, assume the container is empty. As it is suspended in that fashion from the head of the boom, on how many points does that container pivot?

A The container pivots on one point, the single

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point of suspension at the function of the four legs and the suspending fall. It pivots this way (indicating).

Q And assuming a 2-ton container --

THE COURT: Can I interrupt you?

The record is not going to show when you say "This way" and I don't understand it. Go over the pivoting again.

THE WITNESS: It is suspended from four points. The four legs bridle converged those four points into a single point of suspension around which the container can revolve or spin in a horizontal plane.

MR. FRIEDMAN: May I, your Honor, have a marking, by the tying of a knot, so we hold that distance?

THE COURT: Yes.

MR. FRIEDMAN: I will try not to mark your thumb but mark the cord. It is just below where your thumbnail is.

Thank you very much.

Q Captain, will you move your thumb down, shorten the length of the fall?

(Witness complies.)

Q Can you shorten it up more than that?

A I will break it up two blocks.

Q Don't bring it up to two blocks. Is it still

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pivoting on the same point?

A Yes.

Q Assuming an empty container suspended from a single point, is it possible for a single longshoreman or a group of longshoremen to turn one of these containers and cause it to revolve?

A Yes, one man exerting some manual force and one end of the container can push it around. For all intents and purposes it is weightless. The power of the winch --

THE COURT: I think that's obvious. A man could push it.

Proceed.

Q Now, going back, if I may, Captain, and I don't want you to come down but I just want to show you these two diagrams. First Defendant's Exhibit P as shown here, assuming proper operation of the winch with the boom rigged and it is shown here, is it possible to move this container which is depicted here as No. 1, in other words, to pivot from its place as depicted in the stow without in any manner touching or disturbing container No. 2 as depicted in that plan?

A Yes, sir, it is possible. It is done every day of the week.

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Q And would you tell me how it can be done, Captain?

A The wire coming down, wire rope coming down from the head of the boom depicted on the drawing by a dotted red line, the winch operator merely sets his 3-ton winch or 5-ton winch, sets it tight, takes the weight of it, makes it taut. Then he stops that winch, and in this case that winch would be his right hand. Then when everything is clear he centers the weight on the four legs of the bridle, then he goes ahead on the Burton fall, which is the one leading across to the pier. He doesn't touch the up and down fall. The motion now that is created is limited to the radius that is generated by the length of the up and down wire. He merely pulls it up and away, clear of everything.

Q I take it back, Captain.

I think perhaps it would be clearer if his Honor will permit you to come down and demonstrate to the jury what you are doing.

A When the winch operator -- he controls the length of this wire and the length of this wire by manipulation of the controls of the winch. He stands right up here between these two winch controls and he can see what he is doing. So he sets tights on the wire, this

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wire, he sets that up tight so the strain on that wire exerts an equal strain on all four legs of the bridle. He can see and just keeps pulling it slightly until it is taut.

Now, he stops that winch and he sets tight on it on the other winch that runs up to the house span, to the house fall block and over to the junction of the falls. Then all he has to do is make two motions, one with his right hand and one with his left. He goes ahead with his left hand which is controlling the ouse fall. He holds this one, his right hand still, he holds this wire in a taut position. When he does that, when he leaves on this Burton fall, now this point merely moves up in the arc that is governed by the length of this wire and he moves up and away by working one winch. As soon as it is clear then he starts to slack off on this winch.

So it is two motions: Heave on the Burton fall, slack on the up and down.

Q When he moved up and away and the container is clear, what does he do then?

A He commences to slack off on the up and down fall and then he controls the path of the container across the deck, position 1-A, 1-B, and then he lowers it down clear of the rail to position 1-C where the men

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get ahold of it on the pier,turn it around and put it in the door.

Q Assuming, Captain, with me that Captain Ash, who testified, gave as his opinion that in lifting this container which is shown here, and I am talking about the top of these containers.

A That is container 1 over container No. 3.

Q Is container No. 1 there also?

A Yes, sir.

Q In lifting it in his opinion the head of the boom should directly plumb the No. 1 container in the same fashion asyou have depicted it here, and on that diagram directly plumbing the No. 2 container. Will you assume that is what Captain ASh has testified to?

A Right.

Q Assuming the same house fall with the head of the boom plumbing the No. 1 container, would the same procedure be possible that you have just described, would it work in the same way?

A It would work in a very similar manner, but now you would set tight in this line of force directly over that container and then you would have to lift up an inch or tw on the up and down fall just to clear the bottom one, then you talke it across. But that would involve three

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motions of the winch operator. Lift, then heave on this one and have to slack on this one.

THE COURT: I don't understand the difference.

THE WITNESS: Lift the container on the one fall first. When the container is lifted on the one fall it lifts straight up. As soon as it loses its points of bearing it would have to go straight up. Then it couldn't go across the path until he has lifted. When it is done with the house fall over here, because of the angle here, she already got it sitting tight. Then he sets this fall up and he doesn't touch this one until the container is made clear by heaving on the Burton fall.

THE COURT: In other words, he can free it -- if you have the head of the boom plumb over container No. 2, he can free the container No. 1 by simply taking on that long, whatever you call it?

THE WITNESS: Burton fall.

THE COURT: Whereas here if the boom is plumbed over No. 1 he would have to take it up with the line from No. 1?

THE WITNESS: That's right.

THE COURT: And then he would have to move it away with the No. 2?

THE WITNESS: That's right.

THE COURT: All right.

Q Now, Captain, as between the two procedures that are depicted here, the boom spotted in Defendant's P and Q, and the one I referred to referring to Captain Ash's testimony as having the boom spotted directly or plumbing container No. 1, is one of these metnods, in your opinion, more efficient than the other?

A Yes, sir.

Q And would you tell me which is the more efficient, in your opinion, and why, in your opinion, is it more efficient?

A This method displayed here better and involves the least manual work. It is easier. You spot your boom over the draft you are eventually going to pick. You are going to eventually have to take this one off. If you spot your boom here then you have all the manual work in lowering the boom, swinging it further off and respotting over No. 2. Then after you get done here you have to go back to No. 3 and to No. 4. Then you have to spot your boom at least four times to handle these 8 containers. Then you have to spot them over here. So you have continual respotting of the boom.

Q Now, Captain, I don't know whether you heard it or not, but will you assume with me that Mr. Langan, the

hatch boss at No. 4 hatch on the Concordia Viking on July 12, 1971, testified that in his opinion the head of the boom should be spotted right where this X is, in other words, at juncture of these four containers. In your opinion, is that a proper position for spotting a boom?

A No, that is improper because you are not plumbing any of the four top containers. You have to plumb or nearly plumb the load that you are going to pick.

In this diagram, you can compensate for that off plumb because of the direction of the house fall. You can actually utilize the house fall to lift away and up. One fall does both, lifts away and up. Over here you are depending on one fall to lift up.

Q And if you attempted to pick these top containers with your boom spotted as shown where that X is, the head of your boom, what would result?

A The tops of all the bottom containers would be damaged, dented, punctured or whatever.

Q Would that be because it would result in a dragging of each one?

A Yes, you would necessarily create a drag. You would be dragging a 2-ton container over the fragile top of the bottom.

Q Would a dragging result from any of the

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1, 2, 3 or 4 containers that is depicted there on the board, if you had the boom spotted in that fashion?

A As you pick every one of them because you are picking on a single point of suspension.

Q Now, Captain, assuming any other positioning of the head of this boom, this port boom, other than spotting the boom as depicted in this diagram by you plumbing container No. 2 and plumbing container No. 1 as depicted by Captain Ash. Now, I am referring to the affluent. Just consider these actual containers 1, 2, 3 and 4: Orher than plumbing No. 2 as depicted here and plumbing No. 1 as testified to by Captain Ash, is there in your opinion any other proper method of spotting that boom?

A No other proper method as far as I can see.

Q And assume for the moment, Captain, that instead of being the 4 after containers as depicted here, we are talking, let us say, the 4 fourward containers, the ones stowed forward of these as depicted here, would you spot the boom in the same fashion, to pick the forward ones?

A Relatively, yes. I would spot the boom over the inboard container in the forward row and then I could pick up every container in that row without respotting the boom.

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Q And with respect to the positioning, how far up board the head of the boom is positioned or spotted, is there a regulation or does good practice dictate any rule with respect to how far outboard, or in this case offshore, you could spot the head of your boom?

A Yes, there is. As a custom and there is also a regulation --

THE COURT: Is this necessary? I certainly get the mpoint of most of it, Mr. Kain.

MR. KAIN: One further question, your Honor.

THE WITNESS: The head of the boom should be spotted no further outboard than is necessary to control the load that you are going to pick. This is the load you are going to pick.

MR. KAIN: I am through with the diagram now, your Honor.

Q Captain, will you look at these two diagrams, which are Defendant's Exhibits M in evidence, a capacity plan, and Defendant's Exhibit C in evidence, a general arrangements plan, and will you assume with me, Captain, that the arrival draft of the Concordia Viking, which arrived alongside Pier B, Hoboken, was 21 feet 8 inches forward and 23 feet 2 inches aft. Could you tell me,

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Captain, what would be the mean draft of the ship?

A The average draft or the mean draft would be 22 feet 5 inches. That means the depth of water that the ship is drawing at mid length, mid point.

Q Referring to Defendant's Exhibit M in evidence, the capacity plan, and more specifically to the deadweight scale on that plan, can you give me the displacement draft of Concordia Viking at that time?

A Yes. The total displacement is 12,800 tons, very close to 13,000 tons.

Q And the displacement draft is the weight of the water displaced by the ship, is that correct?

A Yes, sir. the actual weight of all the material, the ship itself, the cargo, fuel, water, people, stores, everything. An object displaces its own weight in water.

Q Now, Captain, bearing in mind the mass of the ship, if I can use that word, in your opinion what effect, if any, would the tides at Pier B, Hobken at any time of the year have upon the movement of this vessel, assuming she is lying with her engines not operating, at least her propulsive engines not operating, alongisde the pier?

A The rising of the tide the ship would come up in relation to the pier. The mean range of tide at Hoboken is 5 feet, meaning there is 5 feet at -- at

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low water the water is 5 feet lower than it is at high water.

Q What effect, if any, would the passing of a tugboat in the vicinity have?

A On a mass of 12,800 tons, immeasurable, you coudln't measure it. Imperceptible.

Q Such motion as existed -- the ship does have some motion at all times, doesn't it?

A Rising with the incoming tide and its falling with the outgoing tide. If the wind is blowing from the offshore side it would hold the ship against the pier. If the wind shifts, the ship moves off the pier. But the rate of motion is imperceptible.

THE COURT: What?

THE WITNESS: The rate of motion is imperceptible.

Q By that you mean it wouldn't suddenly move out against the mooring lines or anything of that sort?

A No, it would not.

Q And would that also be true, Captain, assuming a passenger lineer or cargo ship moving up or down river?

A Again, the rate of motion to be imperceptible. But the force of the motion, if it came up against the mooring lines, it would simply pop the mooring lines,

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break the lines, because you have 13,000 tons moving at a given velocity. You can figure the impact. The energy equals the mass times the velocity square.

Q Now, Captain, assuming the stowage as depicted in your diagrams and as you have already testified to, that is, with containers, dunnage on the lower deck underneath the chocking and dunnage between the upper and lower container in your opinion, based on your experience would an empty container weighing 2,000 pounds pivoting on a single point in the -- let me rephrase the question.

Assuming the stowage dunnage underneath and between as you have heard it described, what would be the effect, in your opinion, based on your experience as a ship's officer and stevedore superintendent, of an empty container weighing 2,000 pounds pivoting on this single point or cargo hook, swinging against an empty container also weighing 2,000 pounds but stowed with the dunnage and in the manner I have described to you, that is with the dunnage between?

A The container that was swinging or revolving around its point of suspension would merely bounce off the loaded container. If it was spinning around it would bounce off the loading container and this end would hit and this end would hit and then it would bounce until

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it came to rest.

Q And would you anticipate, assuming again an empty container, that noise might result from such a striking?

A Yes. These containers are like a very large drum when they are empty. You can slap one with your open hand and it can make a loud drum-like noise.

Q Could you tell me, Captain, based on your experience, specifically on the types of ships you have been on board for survey purposes?

THE COURT: I couldn't hear the question.

Q Tell me, Captain, based on your experience, specifically with reference to the types of ships you have been on board, worked on board as a stevedore or perhaps a ship's officer, on a container ship, assuming a cellurized containership -- do you know what that is?

A Yes.

Q What is that?

A Cellular-type container ship is one that is constructed so when the hatch is opened we have cells created by steel structure and the container is like the elevator out here, the container is lowered into the top of the cell and lowered on each corner. 4 steel corners which serve as guides and lowered down.

Q In such a stowage, a cellularized container ships, are stacking plates normally employed between containers?

A Below decks no stacking plates are used. The cells itself takes care of them.

Q Stowed like that are these containers properly stowed, that is below decks?

A Yes.

Q Approximately how many years did you go to sea?

A About 16, as I recall.

Q And did you on occasions, Captain, carry large crates, machinery?

A Yes, sir, I did.

Q And is there any type of cargo that you carried or have carried on dry cargo ships that would approximate the size of one of these containers, that is a large case, 20 by 8 by 8, approximately that size, maybe a little longer, wider, maybe a little less?

A Yes, many times, several types of cargo that would approximate that.

Q What types of cargo?

A Boxed automobiles. Years ago we used to carry most automobiles encased in boxes so they could be stacked in holds or on deck.

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Q And from a stevedoring point of view are the principles as to handling and securing and discharging different with respect to securing containers and cases such as you have described? In other words, as a stevedore, a working stevedore, stevedore superintendent, would you consider and empty container in effect a big empty case or box?

A That's simply what it is, an empty box.

Q And would you consider that the same principles apply in placing it on board and securing it for sea, transporting it, discharging it?

A In principle it would be the same. But in detail it would vary slightly, because there is corner posts on a big wooden packing case. You put the sling right under the case. When you lash it down you put planks across the top of the case, you reinforce the top of the case and you pass the lashing straight over it. In detail it varies slightly but in principle it is the same.

Q But from the stevedores point of view, I am referring now to your experience when you were a stevedore superintendent, you considered it decent deck cargo and you applied the same general principles to securing it as you would to an empty container or any other type of cargo, is that right?

A That's right.

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Q Captain, in the years you were a stevedore superintendent, how long was that?

A 1952 to 1955.

Q And for what stevedore did you work?

A I didn't hear you.

Q What stevedore did you work for?

A John W. McGrath Corporation.

Q In the years that you worked for John W. McGrath Corporation, Captain, did you on any occasions, and I am referring now to you personally, working as a stecedore superintendent, did you on any occasion send a gang of lashers on board to remove lashings?

A No, sir, I never heard of a gang of unlashers. Simply not used.

Q Did you on any occasion send gangs ashore to put on the lashings?

A Yes, we have specialized men that are trained in securing the cargo, lashing the cargo down. But it doesn't take any specialized training to let it go. Longshoremen let ig go.

Q And assuming the lashings are not removed by the ship's crew, who would let go of the lashings in the Port of New York?

A The longshoremen that's going to work the hatch.

They would let the lashings go and the stevedoring company would bill the ship for the time.

Q Now, in your experience, Captain, both as a ship's officer and as a stevedore superintendent, what was the practice with respect to removing of lashings? Was it done, in your experience, simultaneously with the discharge, for example, of these containers? I don't know if you hear Captain Ash's testimony. Assume there was testimony in this case that these containers carried on board the Concordia Viking were unlashed one at a time as they were going to be removed.

A Yes.

Q Is that the usual custom and practice that you have t followed and seen or experience not only in your stevedoring work but in your work as a ship's officer sailing in and out of the Port of New York?

A No,sir, that does not conform to my experience. I have never seen it done.

Q How has it been done in your experience, Captain, both as a stevedore and ship's officer?

A If time permits the ship's crew will let go the lashings and put the gear away. If the time does not permit the ship goes alongside, the stevedore gangs are ordered aboard. They take off the lashings, place them out of their

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way on deck. Later on the ship's crew will gather them up and put them away. This is the way it is done.

Q In your opinion is there anything wrong or anything improper about removing all of the lashings before the longshoremen come on board?

A Nothing is wrong with it. In fact, it is preferable, because now when you have taken the lashings down and extended in the walkway between the containers and hatch, you have eliminated hundres of tripping hazards by taking those lashings down.

Q Now, Captain, assuming a stowage of containers on No. 5 hatch on the port side as depicted in your drawing, shown in this drawing, and assuming the dimentions as shown in the general arrangement plan and the installation of stiffeners both on the hatch coaming and the ship's bulwarks as shown. Assuming also a stowage of 8 containers. Now, is there any way that these corner castings can be reached by a ladder, in your opinion? I am referring now on the upper container and the lower container.

A Normally, no, you couldn't reach that. A minimum of 8 feet from the perimeter of the stow.

MR. KAIN: I have no further questions at this time.

THE COURT: Let's take a short recess.

(Recess.)

THE COURT: Mr. Leonard, do you have any questions?

MR. LEONARD: I do, your Honor.

CROSS EXAMINATION

BY MR. LEONARD:

Q Captain Wheeler, Mr. Kain asked you a number of questions about the method being used by the longshoremen to discharge the containers onto the deck. Let me see if I can shortcut this. Do you have any complaint to make about the method that was being used as described by the witnesses during the discharge of July 12, 1971, of the containers from the Concordia Viking?

A I heard nothing that was not in accordance with a routine stevedoring proper operation.

Q Now, Captain Wheeler, there was some discussion about camber, which you said was a slope in the deck so as to permit rainwater to run off; is that correct?

A That is a secondary effect for the drainage, for the rainwater or sea water to drain off. The primary reason is to make it stronger. An arc makes it stronger.

Q I show you Defendant's Exhibit D in evidence, which is a photograph of the deck area in the vicinity of hatch number five on the port side. Now, if you compare the line formed by the top of that container and the line of the horizon as shown in that photograph, is there a difference

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between, is there an angle formed by those two lines?

A Yes. There is a --

THE COURT: There is. We can all see it if it is there.

Q To what, if anything, do you attribute that line, that angle?

A That angle is created by the camber of the deck. The container is resting on the deck which is cambered, sloped.

Q Does that photograph, Defendant's Exhibit D, in any way bespeak of a list on the vessel?

A No. By comparing the bulkhead, the structure of the ship, the house on the after end of the ship, with the vertical shown on the high rise building in the background, they are both about the same. But the container is off the vertical.

Q Captain Wheeler, last week we had some testimony by the plaintiff and by a man called John Morich. You were here during that testimony, were you not?

A Yes.

Q I want you to assume that the plaintiff and John Morich testified while the plaintiff was atop the aftermost outboard container two high, that that container suddenly and violently moved some four to six feet inboard so as to occupy

the space which previously had been occupied by the container which was lifted and taken away. Have you got those assumptions?

A I understand that.

Q Assuming that that testimony was given, do you have an opinion as to the physical possibility of that event occurring as described?

A I could --

THE COURT: Let's cut out the word violently. I don't think anybody said violently.

MR. LEONARD: I will eliminate that word.

A I can conceive of no force that could be anticipated to cause that container to move inshore.

Q I want you to assume, Captain, that there is a container on the deck of the Concordia Viking; that on top of that container corner post to corner post is a second container; that between the corner posts of the two containers there is no stacking plate.

A Right.

Q But instead there are strips of dunnage. Do you have an opinion as to whether two containers thus placed would furnish a suitable and stable platform for the purpose of discharging the containers onto the dock?

A Yes, sir.

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Q What is that opinion?

A That stack of containers would be stable to a safe degree. In my opinion you could list the ship 20 degrees and they wouldn't move.

Q What is furnishing the stability to the containers thus stowed?

A The fact that it is 20 foot lengthwise and the critical dimension is eight feet in a transverse plane, athwartship plane, and that the center of the gravity is its geometric center. It's not unevenly loaded, it's empty. The center of gravity is the geometric center of the rectangular object.

Q Now, Captain, I want you tc assume a somewhat different set of testimony. Were you here when Mr. Langan testified?

A Yes, sir, I was.

Q And I want you to assume that it was Mr. Langan's testimony that a container being lifted swung so as to strike the forward --

THE COURT: Did you hear Mr. Langan's testimony?

THE WITNESS: Yes, I did.

THE COURT: We all have that in mind.

Q Swung so as to strike the forward end of the forward outboard container. I believe you told Mr. Kain

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that would not produce any motion at all on the part of this outboard container; is that right?

A Not at all.

Q I want you to reject your testimony for just a minute. I want you to assume that Mr. Langan further testified that that container pivoted or swiveled. Tell me, if you will, the location, if any, of any pivot point on the outboard container?

A On any container in stow there is no pivot point. All the weight is concentrated on the four corner posts and there is actually space underneath the body of the container. So in order to pivot, for one end to go this way and the other end to react and go the other way, you have to have a pivot point underneath. Like the table, if you push on one end of the table, if it has four legs, if you push on one end, the other end goes in the direction, it merely turns in relation to the rigid structure of the table.

Q In the center of the container there is no contact, because if there was it would damage the roof of the container below. The roof is not strong enough to sustain the weight of the container above it.

Q Now, what was the area of each of the points of rest of the corner posts that you described?

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A On this one it is about six by six, as you can see.

Q Six inches by six?

A Yes. On most containers it is six by six or eight by eight.

Q Inches?

A Yes.

Q So that on each one of those corner posts, if I understand you correctly, is exerted a force of approximately a thousand pounds on a two ton container?

A One quarter the weight of the container, theoretically.

Q I want you to assume there was testimony that the top container of a two high outboard stow moved inward a distance of four to six feet so that the ends of that container rested in the center of the top of the adjacent and inboard container. Do you have that assumption?

A I have it.

Q What, if anything, would you expect would happen to the inboard lower container had such an event occurred?

A The top of the container would be severely dented, if not punctured.

Q Are the tops of containers built to resist pressures of a thousand pounds in a six by six inch or six by eight inch concentration?

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A No, they are not.

Q I show you Defendant's Exhibit M upon which some markings were placed this morning by Mr. Friedman, in concurrence with the mate of the ship, the chief officer. And Mr. Friedman asked the chief officer to make some measurements to a point located slightly forward of the midpoint of the number five hatch on the port side.

I want you to assume that Mr. Langan, the hatch boss of number four hatch, was in the process of descending from the main deck to the 'tween deck area, had one foot over the coaming and on the top rung of a hatch leading down into the number four hatch; that the ladder that he was using was on the forward end of that hatch and was in the center of the hatch.

I want you to also assume that on the port side of number five hatch there were seven containers, four containers forward, three containers aft, one having been removed, just as you have heard the description in the testimony.

Do you have an opinion as to the possibility of a six foot high man in the position that I have described to you being able to see the entire body of a man standing approximately one foot -- we will assume one foot -- from the edge of the outboard top after container?

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A He could not see the entire body of a man in that position.

Q Why is that?

A His line of sight would be blocked by the sixteen foot height of the containers, the forward most four containers at number five hatch. His line of sight would go well above.

Q Captain, I want you to assume that when Anton Picinich mounted the top of the containers at number five hatch, port side, that the lashing wires had been removed, not only slacked off but actually had been removed, except for one lashing wire which was dangling through the top corner post of the after outboard top container. Do you have an opinion as to whether or not there was any impropriety in the crew leaving that one wire present there?

A I don't think -- in my opinion there was nothing unusual about encountering such a wire that had been left by the crew. It is possible, very possible it became jammed in place and they couldn't pull it down and they know that the stevedore has to clear it before he can attach the lifting gear. So they leave it for him to do.

Q By the way, I note when Mr. Kain asked you there was a time when you worked for my client, John W. McGrath Corporation.

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A Yes, sir, there was.

Q Since you have gone into the business of being a stevedore consultant you have appeared in court on other occasions, haven't you?

A Yes, sir, I have.

Q Did you ever testify against John W. McGrath Corporation in a suit?

A Yes, sir, I have.

Q Have you ever testified, have you ever been retained by attorneys for plaintiffs in personal injury actions?

A Yes, sir, I have.

Q You don't restrict your activities to testifying for stevedores --

THE COURT: He has already said that.

Anything else?

Q Captain, what does the phrase "metacentric height" mean?

A Metacentric height is the point, imaginary point within the hull of a ship through which -- it is a locus of points through which the center of buoyancy passes as the ship rolls. And the distance from the metacentric height to the center of gravity of the ship at any given load condition is called the metacentric height. It is a measure

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of the entire ship's stability.

Q And I think in answer to a general question, the higher the weight stowed on a vessel the less stable it is and the lower the more stable?

A Not less stable. It still has positive stability but it takes a lesser force to make it roll over. To make it list or roll.

Q Captain, I want you to assume on the Concordia Viking that there were on deck some 76 containers, each weighing two tons. In my arithmetic that would be 152 tons of top side weight, and that was all the cargo that was stowed on the deck. Do you, in your opinion, or do you have an opinion as to whether the stability of the vessel would be significantly affected by 186 tons of top side weight, deck cargo that is, on a vessel carrying approximately 6000 or more tons of cargo, stores and bunkers and water?

A It would not have any significant difference or create any significant problems. For instance during the war we had more than 300 tons of guns and ammunitions on the decks of these ships.

MR. LEONARD: No further questions.

THE COURT: Mr. Friedman.

MR. FRIEDMAN: May the record show it is seven after four o'clock.

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THE COURT: We will go quite late tonight if we need to; to finish the evidence.

CROSS EXAMINATION

BY MR. FRIEDMAN:

Q Is any part of your fee for your services in this case, including your court appearance, being paid by Mr. Leonard, his firm or the interests he represents in this case?

A No, sir, not as far as I know. My bill goes to Mr. Kain.

Q You have made no or are not aware of any agreement or understanding --

THE COURT: All right, Mr. Friedman, we will go on to something else, please.

Q Is it your testimony that if the boom was spotted, and when I say in the location I naturally mean that the top of the boom was in the plumb line vertical above the center point between the four containers; that that was a perfectly proper stevedoring discharging procedure?

A My testimony was directly contrary to that.

Q So that if what Mr. Langan described was the procedure followed for the location of the topping of the boom on the Concordia Viking on July 12, 1971, was what occurred, then you are saying that an improper method of dis-

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charging occurred in that regard?

A Yes. He would have damaged eight containers, you would have a bill for eight containers, damaged.

Q In any case if the boom was topped off in that location that was an improper method?

A It would create -- it would be an improper method. It couldn't be done without damage, extensive damage.

Q Mr. Wheeler, is it possible to get a straight yes or no answer?

A It certainly is.

Q Let's try that next time, all right?

How many times have you testified in court before?

A Before?

Q Yes.

A First time was in 1955, that is 20 years ago. Then I would estimate fifteen times, on the average -- first it was very infrequent, lately more frequent. About ten to fifteen times a year.

THE COURT: Keep your voice up, please.

Q Now there have been a couple of hundred times. If you can answer directly with a yes or no, please do that.

Now, when was the last time you were on the

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Concordia Viking?

A I don't have any recollection of ever having been on the Concordia Viking but I have a recollection of being on Concordia Line ships, and they are di ferent, one from the other.

Q Is that what you would call an effort to give me a straight answer, Mr. Wheeler?

A I'm trying to eliminate further questions.

MR. KAIN: Your Honor, I object to this.

MR. FRIEDMAN: I asked him to tell me the last time he had been on the Concordia Viking. He told me he had never and then added about fifteen unnecessary words at now ten after four. I think I have a right to object, your Honor. The witness has appeared 300 times in court.

THE COURT: Do you have anything else to say, Mr. Friedman?

MR. FRIEDMAN: That is all on that subject.

THE COURT: Let's go ahead with the questions.

I am with you in requesting the witness to be brief but I think the last answer was a particularly natural one and didn't need to call for any comment.

Q You did tell us as part of that answer that each of the vessels was different from the other, did I not understand you to say that?

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A It's my recollection there were some differences between the ships in the Concordia Line fleet.

Q Now, a man standing at the number four hatch, forward end, will you assume for me that he is something about, just an inch or so, over six feet in height. I think that is what Mr. Langan told us.

I am going to ask you to assume he has testified at least by that time his deck containers, and by that I mean the ones at the number four hatch, had been discharged.

A I heard that.

Q You remember that. Now, is it your testimony, without ever having been on the Concordia Viking, that a man standing at the forward end of the number four hatch, and do you know how long the number four hatch is?

A It is on the plan.

Q I know it is on the plan but you testified to something five minutes ago. I am going to ask you without looking at the plan, how long is the number four hatch?

A I don't need that measurement to determine the measurement that you are after.

Q It is the fact that the man we are talking about, Mr. Langan, was the distance of that number four hatch, the distance you haven't told me, plus some additional number of feet away from where Mr. Picinich was standing with his feet

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six feet high; right?

A That is right.

Q And his head, since as I recall the testimony, and Mr. Picinich gives the appearance of being six feet high. So his head was 22 feet above the deck. Are you prepared to testify that a man six feet high himself standing at the forward end of the number four hatch with no deck containers along the number four hatch could not have seen any part of Mr. Picinich standing at the forward part of what we are calling here the number three container along the number five hatch?

A No, I didn't testify to that.

Q Because you said, and the question was couched, whether you could see the entire man; right?

A That was the principle.

Q That was the critical word, entire man. So you will agree now that we have looked at the whole question, he, Mr. Langan, did have a line of vision as to part of Mr. Picinich?

A If they were both standing --

THE COURT: To avoid a lot of fireworks here, my memory, and I can look back in my notes, is that Mr. Langan testified that he could see Mr. Picinich's entire body. That was the testimony of your witness.

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MR. FRIEDMAN: Did he testify he could see his feet, your Honor? I mean let's deal with reasonable physical possibilities. At any angle a man is standing taller than you, you immediately can't see his feet. If your Honor says Mr. Langan testified and swore he definitely saw Mr. Picinich's feet, then he so testified. But is that what your H nor feels he said in all fairness?

(Pause)

MR. FRIEDMAN: I am willing to rely on the jury's recollection.

THE COURT: We had a lot of problem about this question and in all fairness we should recall the reason for the question was Mr. Langan's own testimony that he saw Mr. Picinich's entire body. Now whether he did --

MR. FRIEDMAN: At what point, when he saw the man in the air or while he was still perched on the container?

THE COURT: The question was not senseless.

Q You will agree, without any fireworks and I apologize for any, that there was a line of vision from where Mr. Langan says he was to at least part of Mr. Picinich's body as to where Mr. Picinich said he was?

A If both men were standing erect.

Q Now, let me ask you another question. Were you here in court when Mr. -- well, the prior witness and I hate

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to mispronounce his name, Mr. Vangsnes testified?

A Yes.

Q He said he had been on a container ship for about a year in 1973 to '74, if I caught the dates properly, and he said, did he not, that when they put the containers in the cellular steel frames in the deck they do use the stacking devices.

A He didn't say that.

Q You didn't hear that testimony?

A I heard him speak about and you questioned him about cellular container ships. Then you asked him about using stacking plates on his ship and he says yes, we use them. But he didn't have a cellular type container ship.

Q That's the way you understood his testimony?

A That is the way it is.

Q Let's go on anyway because that is not what we are dealing with here. We are dealing out on the deck, containers being used not in any steel framework but out in an open deck.

A On what kind of ship?

Q It is correct that you heard testimony that in those circumstances stacking devices are employed?

A On container ships, yes. Container ships are limited to the carriage of full and empty containers.

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Q Now, the spotting of a boom, and I wish to come back to that for a moment, is something that takes at least some period of time?

A Of course.

Q And once it is set you have a set condition that exists for a certain period of time?

A The boom is in a fixed position. That is what is meant by spotting a boom.

Q That setting of the boom or what you call more technically the spotting of the boom, which is its location, is a condition which exists for a period of time as distinct from being something that just passes through that just exists for a moment?

A Of course.

Q Thank you.

Now, this winch operation that you described in which the winch operator has two winches, two what you call them; drums, two drums that he is operating with his levers and if we go back to the old days -- I'm old enough at least -- to remember driving a car using the clutch. So that you had to, in other words, use the clutch and use the right foot for one purpose and the left foot for another purpose. You had to coordinate those operations.

A Not on a winch.

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Q Hold on, please. He is dealing with his left hand with one wire and the right hand with another wire; right?

A Yes, two controls.

Q But that is the point, he is coordinating the right and the left?

A That's right.

Q Now, by the way, in terms of the situation here, one of the variables involved is just what the tide was at the particular time?

A The tide?

Q The tide which would affect how high this ship was alongside the pier.

A It would affect it, definitely.

Q And you don't have and you haven't been given a particular number or fact as to that. That is just one of the variables that you haven't had specifically?

A That is right.

Q Do you have or from the testimony should be able to establish a particular specific height of the house fall, or have you just been assuming an area of height, the range of height that you believe is the proper one?

A I have worked on piers --

Q No. My question is with respect to what was the

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actual fact in effect on the pier B, Concordia Viking, morning of July 12, 1971; have you knowledge, from any record or document or from the specific testimony of any of the witnesses that were present, as to just what the height of the house fall was?

A I'm depending on my own recollection of pier B.

Q And I'm sorry for the rhetorical question, but, of course, you were not present at pier B on this day?

A No, that's right.

Q Now, to come back to the boom for a moment. As to just what the location of the boom was, where it was spotted and what the angle of the wires that, therefore, came from it, there again you do not have the specific fact that was in effect on the morning of this occasion at the place in question?

A That point was never exactly specified.

Q You have had to make certain assumptions in that regard?

A Of course.

Q With respect to the dunnage it is fairly standard for dunnage to be of one inch thickness; right?

A Yes.

Q But it also occurs, and it is not the rarest thing in the world, for more than one layer of dunnage to be

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employed from time to time?

A For a specific purpose.

Q And here again as to the number of layers of dunnage that were employed with respect to the loading and the condition of these particular containers, you are again now, in this instance, you have been making certain assumptions?

A Consistent with good seamanship, good stowage, good stevedoring practice, yes.

Q But not, and I don't mean to misuse the term, but not consistent or specifically based, let me put it that way, not specifically based on facts in evidence as to just what was in effect in this case on the day in question?

A That is right. I didn't hear those questions or that information.

Q So you, therefore, made assumptions in that area?

A Again, consistent with reality.

THE COURT: Please, go on.

Q Whether the dunnage was nailed was not a matter that you heard testimony on in this case, was it?

A You don't nail dunnage.

Q Excuse me, did I not understand you to say that the dunnage was nailed -- that since dunnage cannot be nailed

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to the steel deck, it is nailed to the chocking?

THE COURT: The chocking is nailed to the dunnage.

Q I'm terribly sorry. I misspoke. Did you hear any testimony from any of the witnesses that in fact on this occasion the chocking was nailed?

A I didn't hear it, no.

Q So again you made an assumption in that regard?

A Again consistent with reality, yes.

Q You say consistent with reality. You mean consistent with what should have occurred?

A That did occur; otherwise the chocking would be washed away the first sea that comes over. This is reality.

Q What the nailing would have been, where it was nailed, how much it would be, you didn't get any information?

A I know it was secured. I heard testimony that it had been secured.

Q Now, with respect to how close these four containers were to each other, did you make certain assumptions in that regard?

A I heard testimony that the base of the containers were butted up against each other due to the camber of the ship, that they would be somewhat further apart at the top and wood was inserted in that area.

Q You heard testimony, you say, that they abutted

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each other at the foot?

A At the base, yes.

Q But as to whether or not the dunnage was so placed as to offset the camber or to level the camber, as to that area, and, therefore, the effect that that would have on the upper edges, as to that you made certain assumptions; correct?

A I heard testimony that one piece of dunnage or one thickness of dunnage was used under the corner posts. That would indicate to me that no compensation was made to accommodate the camber of the ship.

Q You heard other testimony to another effect as to what the dunnage arrangements was, isn't that so?

A That was as to what might have been. I didn't hear that as being the fact.

Q When you say you heard testimony as to just what dunnage procedure was followed in this instance, you are referring to the testimony of the chief officer; right?

A Yes, and the longshoremen that says there was dunnage there.

Q Wasn't the longshoremen's testimony to the effect that there was various dunnage rather than just a single strip?

A I didn't hear that. I heard them say there was

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dunnage there.

Q By the way, when was the last time you went aboard a sea going vessel and left port as a sea going officer for a voyage of over two days?

A I said on my qualifications 1955 was the last shipboard position that I held.

Q 20 years ago?

A Right.

Q Would it be fair to say that 20 years ago containerization was a very different subject matter, very different technical equipment and procedures than containerization of ships' cargo in the year 1971?

A We're in the third generation of container ships right now.

THE COURT: Captain, he simply asked you wasn't it different in 1955, the state of container shipping, than in 1971. Now listen to his questions closely and let's make some time.

THE WITNESS: I answered yes.

Q And specifically things like stacking devices, these adaptor devices that have been shown, and I will not take the time, but the various pieces of gear that have been sufficiently described in some of testimony of Captain Ash, these various things had not reached anywhere near the develop-

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ment in 1955 as they reached by 1971?

A That would be generally true.

Q Now, you mentioned that there was a guy preventer wire that comes down from the boom on an angle and that is the most outboard of the wires here in question; right?

A In the rigging of the booms, yes.

Q Of course, the farther inboard the boom top is spotted or located, the farther in and at more of an angle the guy preventer will be?

A I have to qualify that.

Q Let me rephrase it. I will withdraw it.

A I might point out, if I may --

Q Mr. Wheeler, I will withdraw the question.

One end, the bottom end of the guy preventive wire is fixed to the deck railing, right?

A Yes.

Q The top end is fixed to the boom?

A Right.

Q The farther in you bring the boom, the sharper -- if you have the boom spotted directly over the deck rail, the outboard deck rail, then that guy preventer goes straight up; right?

A Yes.

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Q If you spot the boom over where that chandelier is it is going to be at that angle?

A At least that angle and another compounded angle. This is why I tried to tell you before, that drawing is only in two dimensions. There is a third dimension that you have to project into it as you look at it.

Q So even more of an angle?

A No, a compound angle.

Q I don't know how to compound an angle without fracturing my arm.

A It leads up this way but it also goes over that way.

Q All right. Now, the way you got this drawing here in exhibit, whatever it was and is, Exhibit B; the guy preventive wire is just clearing the outboard corner of the number two container; right?

A In the perspective shown -- in that perspective. You have left off the third dimension. The containers are in the background. The guy and preventer comes from a point aft.

Q Do you know where along the deck rail on the number five hatch area they tied down the guy preventer on this particular day and morning of July 12, 1971?

A I don't know. Of course not. I wasn't there.

Q Now, if I understood you, you said that when you

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started to think about all of the forces and strains and capacities of the equipment, it seemed awfully unlikely that they would lift what you have called number one, what we have called over there actually number four, eight feet from its former position so its top would be its bottom, before swinging it over. You felt that, considering all the equipment, unlikely to the point like it just didn't happen that way?

A Yes. Totally unnecessary.

Q Now, nevertheless, whether they lifted it eight feet, and that is just sort of done and over and nobody is holding a tape on it. Anybody who is testifying to it, he is looking at something, and not only is he looking at something, it is just as if I am looking at you and ask how tall you are in your chair, you are at least staying in that position and I can give it a look for a period of time and make a judgment. In that instance it is a moving thing.

A It is up and away and you have to look at it in one frame and make your judgment; right. Are you talking about an experienced stevedore, a longshoreman?

Q I thought we could almost agree on this. I almost have a feeling it is not a question but a statement. That what we are talking about with respect to a container that is being lifted off, being discharged, it is up and away

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and anybody who is making a statement four years later that it was up, be it four feet, six feet, eight feet, two feet, is making a statement about something that just happened in one instance, instant, not that it stood still and he had a chance to look at it; is that a fair statement?

MR. KAIN: If it is not a question, I object to the statement.

THE COURT: It is a question.

If you understand the question, you may answer it.

THE WITNESS: That is why I asked you, if you did it, you might get one impression; if I did it I might get another. Because all the details of a stevedoring operation are anticipated. We know how far we are going to go with it. To a layman it might be a fleeting instant.

Q Whether one person's ability to judge a fleeting instant is better than another, we can agree in both instances it is a fleeting moment that is involved?

A It would be in transit, right.

Q What I am trying to get to, Mr. Wheeler, if I may, is whether what you have called container one was lifted eight feet or something you say --

A That was a hypothetical, by the way.

THE COURT: Let him finish the question.

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Q It had to be lifted from its bearing in order to proceed with the discharging procedure; right?

A You lost me.

Q Then I will withdraw the question.

A Under one --

THE COURT: It was withdrawn.

Q I thought I heard you say in the course of your testimony that as part of the discharging procedure the container involved being discharged is lifted from its bearings -- didn't I hear a phrase in that order?

A Bearing points.

Q Is that right?

A Yes.

Q So what is involved is that number one is sitting there and has been sitting there presumably for some period of time. Then it is pulled up. Before it is pulled away -- and I know now we are freezing something that actually takes place up and away, but let's just freeze it for the purposes of this question.

A May I --

THE COURT: Please, let Mr. Friedman finish.

Q First the tendency is to pull it up before it is pulled away; right?

A When the boom is spotted over that number one con-

tainer, that is the procedure.

Q Now, I'll come back to that. But even if the boom was spotted, which is your hypothetical, which you haven't heard any men on the ship say that.

A That's right.

Q Even if it was spotted above the outboard containers, you are saying that with the wire running down from the boom at this angle, that they would pull with this wire and pull it away?

A After having first set tight on the other wire.

Q That is the way you sort of want it to happen?

A This is the way a competent winch operator does it.

Q And you want him, this competent winch operator, to snatch this 20 foot eight by eight container that way (indicating)? No lift, just that way?

A No, you don't snatch it. That is two ton. You have already taken part of the weight. You have set the wire tight.

Q I have my thumb where you had it on the block of wood. You want him to pull it away gently?

A He lifts it up and away by applying the necessary power to his winch. The fastest the winch can go is maybe 125 feet per minute.

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Q As he pulls it away, what you want him to do is to pull it away but not up, that is with the boom above the outboard?

A He couldn't do as I was describing with the boom spotted over the inshore container. With the boom spotted over the inshore container he has to lift it an inch or two.

Q I wish you would answer my questions.

A You are mixing them.

Q I am not. I am asking these last series of questions and I will tell you when I shift the boom. We have the boom as you drew it above the outboard container. I will tell you if I ask you any questions with any other assumption.

Now, you are saying what you want to see happen is that the way the winch operator is going to operate these two controls, and when I say operate I include holding one steady as part of the operation. You want him to operate these two controls in such a way that this box is going to move sideways but not at all upward?

A I didn't say that. I said compound motion, up and away.

Q Up and away, both?

A Yes.

Q And you want him to do that sort of slowly, not

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in a snatch?

A You can't do it in a snatch. He doesn't have the power.

Q You want him to do it slowly?

A It has to be done relatively slowly.

Q And as it is pulled away from its bearings, where it has been sitting, it has been nestled there for some period of time; is that right?

A Yes.

Q And as it is pulled away from that nestling, some possibility of some swinging, spinning, rotation?

A Some possibility, yes. But that is why we want the compound motion, up and away.

Q That is why we want it. But we know from experience, do we not, Mr. Wheeler, that from time to time, and I don't mean by that with the infrequency with which ceilings fall on people's heads, I mean with the frequency that cars run into another on the streets of our highways; it happens? It is not desired but it happens?

A Human error.

Q That you are going to get that bumping, right?

A You might have some contact. If you want to characterize it as a bump, then there are all ranges of bumps.

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Q Isn't the best way to consider what characterization to give it, Mr. Wheeler, from the people who were on the ship at the time it occurred, wouldn't that commend itself to you as the best way?

A One might describe it as a bump. You could qualify it as a major bump, minor bump, severe bump or a trivial bump.

Q Now I am changing the boom. While it is not in the drawing we have moved the boom over so that it is above the inshore line. Without taking the time, and I know it is late and I appreciate everybody staying, we essentially have the same considerations if the boom was over the inshore two containers with the uplifting and the possibility of spinning rotation?

A There you have more.

Q You have even more?

A You have to go up independently of going over and away.

Q Now, once that kind of thing happens and you have this box in motion, it is being lifted either as you said in a compound direction or an up direction initially, whichever. You have also got the factor of the spinning, the rotation?

A You notice you have to spin it.

Q You shouldn't challenge me on that, Mr. Wheeler.

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It didn't spin.

A Because you set it down. After a rope --

THE COURT: Proceed.

Q Be that as it may, we all know what the weight of this is. I'm not holding two tons right now with this block and cord.

A That is not a three-quarter inch wire either.

Q So that what we are confronted with here, at least as amongst the kinds of things that can happen is not necessarily that one container will strike another flush -- that is one possibility.

A It is possible.

Q Another possibility is that it will strike it in the corner, the front against the front, the rear against the rear. Also as it is pulled away the corner against the midsection. All of these, without repeating 73 possibilities, all of them are among the possibilities in this situation?

A Yes, it is all contact. You can have contact in any of these ways.

Q Mr. Wheeler, let me ask you this: assume that a man --

THE COURT: May I interrupt a second?

(Pause)

Q I am going to ask you to assume that in these con-

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tainer cargoes you have a liftoff of the inboard container about to occur.

A The inboard of the offshore stack, okay.

Q We have been only talking about that group. Let's not confuse that. The group on the port side. We are going to lift off number four and if you tell me it makes a difference, then that is all I want as an answer. What I am saying I am going to ask you to assume that the boom is spotted over the number three, which is the way you drew it in the diagram, or that it is spotted over the number four, which you said was the proper way. The improper over here, which there is some testimony they did.

Let's deal with the two and if it changes your answer you tell me.

The roof of those containers is sixteen feet high above the steel deck and 35 feet high above the water surface.

A I will accept that from you. I don't know that.

THE COURT: We will accept it.

Q And there is a man, for whatever reason, who has been told by his superior to go up on the roof of the second tier outboard container and is doing what he was told to do up there.

A Right.

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Q The container on which he is standing has now been by this point in time completely released from any deck lashings being secured of any kind, not being held down by deck lashings at that point in time.

A Right.

Q There are no stacking devices in place in any of the four corners.

A Right.

Q There are no other securing devices attached to this second tier container that we have heard any evidence about in this case.

A Okay.

Q This number four container on this blackboard is now to be lifted off. Is a proper method for discharging cargo for the number four box to be lifted off with a man still standing on the roof of the number three container in the condition and situation I have described without deck lashings, without stacking devices, without any securing apparatus?

A The man himself should have positioned himself off that number three container onto number one or number two so he is out of the path of the draft.

Q So the answer is it was not a proper method of discharge to lift off that container?

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MR. KAIN: Objection.

MR. LEONARD: Objection, your Honor. That is not the testimony.

MR. FRIEDMAN: I have no further questions. We will let the jury decide that.

THE COURT: Anything else?

MR. KAIN: I have a few questions.

REDIRECT EXAMINATION

BY MR. KAIN:

Q Have you ever been consulted or retained by either Mr. Friedman or Mr. Heller?

A Yes, I have been.

Q Now, Captain, again referring to the drawing which you have made here, Captain, Defendant's Exhibit P, this dotted line on these two high containers indicates what, Captain, on the drawing?

A It indicates that where the second highest of the containers had been located when the ship arrived. It also indicates that that container would have been landed first to make a path for the offshore containers to go, without going too high.

Q That would be necessary in order to prevent this high lining, this big internal runner angle that you referred to?

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A Yes.

Q Now, in picking this inshore container, which is the one in this dotted line fashion, what strains, if any, would this impose on the offshore guys? I am referring to the working and preventer guys.

A When you pick up either of those containers it would cause the greatest resistance in those offshore guy and preventer.

Q Would that create a greater strain on these offshore guys than picking this number two container in the position which you have indicated in your diagram?

A Yes, sir, definitely more strain on the guys and preventers by picking the inshore container than offshore.

Q Also, too, if you were to spot your boom directly so it would plumb the number one or inshore container?

A Yes, sir.

MR. KAIN: No further questions.

THE COURT: Anything else?

MR. LOENARD: Three questions, your Honor.

RECROSS EXAMINATION

BY MR. LEONARD:

Q Mr. Friedman asked you a series of questions about your opinion as to what an individual in Mr. Langan's position could have seen and you told him it was your opinion

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that he could only see a part of a man standing. What part?

A The upper part, head and shoulders, if he was standing erect. If he was bending over he couldn't see anything.

Q Mr. Friedman also asked you to assume that Mr. Langan testified at the time he witnesses Mr. Picinich on the top of the container, that all the containers at number four hatch had been discharged on the port side. I am going to ask you to make a different assumption. I am going to ask you did the stevedores' activity sheet -- excuse me. First assume that Mr. Picinich testified he came on board the vessel at 8:10; that he was injured between 8:20 and 8:30 and that the stevedores' activity sheet shows --

MR. FRIEDMAN: I object, your Honor. The record shows clearly 0850 was the time of the accident. It is in the log, in evidence. Nine o'clock has been given. 0850 is the earliest record of time. If he wants to ask a question based on Mr. Picinich's memory of it and ignore the other evidence on that issue of precise, I suppose I can't prevent that, your Honor, if that is the way he wants to use the Court's time.

THE COURT: You go ahead.

Q I want you to assume that the plaintiff testified

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the injury occurred between 8:20 and 8:30 and at that time the activity sheet of the stevedore shows that discharging operations at number four hatch had just commenced and upon the assumption that no containers had been discharged from number four hatch, port side or starboard side, as of 8:30 --

MR. FRIEDMAN: Mr. Leonard, we can save time; it is five minutes to five. If there were containers at the number four I will concede that would have impeded Mr. Langan's line of vision from where it was drawn on the diagram, if they were there at the time the accident happened.

Q One last question.

Mr. Friedman asked you a number of questions about snatching the container away. You started to answer something about the setup had no power to do that. Would you explain what you meant?

A You do not have sufficient power in the winches to really set up a snatching motion. You would have to have a very powerful winch.

Q Which you didn't have?

A The ship has three and five ton winches.

MR. LEONARD: No questions.

THE COURT: Anything else?

MR. KAIN: May I ask one question prompted by Mr. Leonard's question?

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THE COURT: What is that?

REDIRECT EXAMINATION

BY MR. KAIN:

Q Based on your experience, would it be possible, assuming this accident happened sometime before nine o'clock and assuming the rigging which is depicted and has been testified to, would it be possible at that time, by nine o'clock, to have discharged twelve containers at number four hatch?

A In my opinion, that is impossible. You can't do it that quick.

MR. KAIN: That is all.

THE COURT: All right, you may step down, Captain.

(Witness excused)

THE COURT: What have you next?

MR. KAIN: I have no witnesses, your Honor. I have a document that I thought I had offered in evidence.

THE COURT: Offer the document.

MR. KAIN: It is Defendant's Exhibit B for identification, which is the stevedoring contract.

MR. FRIEDMAN: It is my understanding that is relevant to the claim of indemnification that the stevedore and shipowner asked the Court to decide and not submit to the jury. It is my assumption it is offered in connection

with the aspect the Court will decide. So I have very little interest in that regard. If it's being offered for another purpose then perhaps we can discuss it at the conference which I assume will take place shortly with the Court.

MR. KAIN: Some mention was made of it, your Honor will recall, in connection with my cross examination --

THE COURT: Subject to this particular piece of proof, is there any more evidence that anyone wishes to put on?

MR. FRIEDMAN: I have a five-minute witness.

MR. LEONARD: I do have one small bit of evidence.

THE COURT: Do you intend to read that in anyway now, Mr. Kain?

MR. KAIN: What's that?

THE COURT: The contract.

MR. KAIN: I may want to allude to it. I don't intend to read the entire contract.

THE COURT: I would like to reserve my ruling on that. In other words, you are ready to rest, except for that you can rest subject to a ruling which we can make later at a conference.

MR. KAIN: May I rest subject to a check of the exhibits? For example I thought this one had been received in evidence and I note it was for identification. I was also

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under the impression before I offered it in evidence, I was under the impression that the capacity plan had gone into evidence. May I just do that subject to my record check?

THE COURT: I don't think that's any problem at all.

MR. KAIN: I don't intend to call any more witnesses.

THE COURT: Now, Mr. Leonard?

MR. LEONARD: This will take 30 seconds, your Honor. One question and an answer reading from the deposition of Anton Picinich taken on November 20, 1973, page 11, line 19:

"Q What time of day did your accident happen?

"A Between 8:15 and 8:30."

The other little bit of documentary evidence is an answer to an interrogatory as to Mr. Picinich by the shipowner, the interrogatory being -- I can shortcut it. Interrogatory number one asked who are the witnesses to his accident and the answer given, "Plaintiff does not now recall the names of anyone present at the time of his accident."

Beyond that I rest, your Honor.

THE COURT: Mr. Friedman.

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MR. FRIEDMAN: Thank you, your Honor.

I call Ms. Rakijas as a witness, please.

O L G A R A K I J A S, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Ms. Rakijas, sometime before February, 1975, had you ever served as an interpreter in foreign languages for one of Mr. Kain's partners, a Mr. Malanphy?

MR. KAIN: I have an objection to the relevancy of this particular testimony.

MR. FRIEDMAN: It is highly relevant. If Mr. Kain doesn't agree with me --

MR. KAIN: I question the relevancy to this particular case.

THE COURT: I have no idea what this relates to. Do you want a side bar?

MR. FRIEDMAN: It will take three minutes to present this testimony.

THE COURT: Come over here a second.

(At the side bar)

THE COURT: What is the objection?

MR. KAIN: I would like in view of the fact that

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this is an interpreter being asked, I would like to know in advance, and I would ask him to state to your Honor, what the line of questioning he is going to follow with her is. It doesn't help me if it is given to the jury and you later sustain the objection.

THE COURT: Can't we do that?

MR. FRIEDMAN: They are going to hear it and I haven't come up to them with each witness they have put on the stand and say what is the anticipated relevance of that witness' testimony? I have represented to your Honor and your Honor has had me before and the only time we ever had trouble, with all due respect, and I am not going to overdue the boundaries and I lay my certificate on it.

THE COURT: What is the secret? This is somewhat unusual and it relates to his law firm.

MR. FRIEDMAN: It relates to Dr. Kaplan's testimony at which she was present at the site.

THE COURT: In other words, it is about events that happened at that time?

MR. FRIEDMAN: Yes. Just laying a foundation as to how she came to be there.

(In open court)

Q Ms. Rakijas, sometime before February of 1975 had there been any occasion or occasions when you had

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served as an interpreter in foreign languages at the request of the partner of Mr. Kain's at the Haight, Gardner firm, a man by the name of Mr. Malanphy?

A Yes.

Q Now, sometime, I guess shortly before February 10th of 1975, did you receive any request or call from Mr. Malanphy to serve as an interpreter in the matter of Mr. Picinich, Anton Picinich being examined by and at the office of Dr. Lawrence I. Kaplan?

A Yes.

Q And at the request of the Haight, Gardner, Poor and Havens law firm, did you attend at the office of Dr. Kaplan on that date of February, 1975, for that purpose, so that Dr. Kaplan could examine at their request?

A Yes.

Q Now, at that time, at that point in time, February of 1975, Ms. Rakijas, had you ever met Mr. Heller or Mr. Anton Picinich at all, ever in your life?

A No.

Q Now, when you came to Dr. Kaplan's office, which is 820 Park Avenue, or some such location, in Manhattan, did you meet Mr. Picinich, Mr. Anton Picinich?

A Yes.

Q Now, did you serve as an interpreter?

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A Yes, I did.

Q And who paid your fees for those services?

A That lawyer's firm, Haight, Gardner, and so on.

Q Now, when you first came there with respect to the personnel of Dr. Kaplan's office, and I include Dr. Kaplan himself, who was the first person that you had any communication with of Dr. Kaplan's office?

A That was a nurse.

Q And where did that take place?

A In a small additional room to the waiting room.

Q And what took place?

A Some interrogation. She asked about his personal life, about his general data and that was all.

Q And you served as interpreter?

A Yes.

Q And during the period of time that that exchange occurred, was Dr. Kaplan present or participating in any way whatsoever?

A No.

Q After you completed that process with the secretary or nurse, whichever she was, where did you and Mr. Picinich go?

A To Dr. Kaplan's office.

Q Did you go immediately to his office or was there

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any period of delay between these two steps?

A There was a short wait in the waiting room again until we met Dr. Kaplan in his examination room.

Q Were there other patients waiting?

A Oh, yes.

Q Now, there came a time that you met Dr. Kaplan, you say?

A Yes.

Q And where did you and Dr. Kaplan and Mr. Picinich go?

A We went to a small examination room down -- all the way down in the corridor.

Q What occurred in that room?

A Dr. Kaplan asked him to take off his shirt and his shoes, and he did some examining.

Q I know you are not a doctor, but your best recollection will you describe what you saw occur?

A Only what I remember.

Q Sure.

A He closed one of his eyes and he was moving his finger and asking him to follow his finger. And then he asked him to walk back and forth. Then he struck him with a hammer on his knees for that reflex. Yes, he was pushing his head on some places, trying to do I don't know

what.

Q Did Dr. Kaplan ask any questions of Mr. Picinich?

A Yes, only to follow his fingers, to walk, what was following in the examination.

Q Did Dr. Kaplan ask Mr. Picinich any questions about his earlier history, his life story, his life now, how the accident happened, how he felt or behaved other than his responses to the physical examination?

A No, no.

Q Approximately what was the total amount of time that Dr. Kaplan spent with Mr. Picinich in the course of this examination?

A Hard to say now. Five minutes. Between five and ten minutes.

Q What happened after that?

A He asked him -- he asked us at the same time to go to the next room to take his encephalogram.

Q And did you stay with Mr. Picinich while the encephalogram occurred?

A Oh, yes.

Q And about how long did that procedure take, roughly?

A That is really hard to say again. I tell you, it was very interesting, I was very occupied and involved to follow that. But I would say again no more than ten

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minutes, seven minutes.

Q During the encephalogram examination what time or amount of time did Dr. Kaplan spend in the company of Mr. Picinich?

A I don't think he was in that room at all. He came in, checked and went out again. I was in the room all the time.

Q After the encephalogram examination was completed, what happened next?

A We went to the waiting room again.

Q And then what happened?

A Then Mr. Heller came out of the doctor's office --

Q Let me put it this way: was there any further dealing or contact with Dr. Kaplan after the point you have described?

A I don't think so because we left the office together.

Q So can you tell us, was there any contact between Mr. Picinich and Dr. Kaplan beyond what you have now told us about in the last few minutes?

A No.

MR. FRIEDMAN: That is all.

THE COURT: Mr. Kain?

CROSS EXAMINATION

BY MR. KAIN:

Q Ms. Rakijas, before you served as an interpreter at Mr. Malanphy's request -- is that right?

A Yes.

Q That was at the examination of Mr. Picinich?

A Yes.

Q And you were asked by Mr. Malanphy to interpret; is that correct?

A Yes.

Q And did you talk to a Mr. Remsberg from my office?

A Remsberg?

Q Yes, Mr. Remsberg.

A It doesn't ring a bell. I don't know that name.

Q Have you ever served as an interpreter in one of my cases, Ms. Rakijas?

A No, I don't think so. I think I first met you here.

THE COURT: Keep your voice up, please, so everybody can hear you.

Q Do you have a recollection of ever having talked to me on the telephone before the trial of this case, Ms. Rakijas?

A No, I don't think so. Maybe I did. I really don't remember.

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Q If I were to tell you, Ms. Rakijas, that you have would that refresh your recollection?

A Yes, please do.

Q And have you talked to Mr. Malanphy?

A I only remember Mr. Malanphy.

Q Have you talked to Mr. Malanphy before you served as an interpreter in the Picinich case?

A Did I talk to him?

Q Yes. Have you had any dealings or conversations with Mr. Malanphy before you heard from Mr. Malanphy with respect to the Picinich examination?

A I met Mr. Malanphy maybe two years ago on another case and that is how he met me.

Q That was another case?

A Yes.

Q And did it involve, also, a Yugoslav longshoreman?

A Yes, it was a longshoreman they asked -- at that time I was working for an agency. They hired me. But we found out when we got together that man wasn't Yugoslavian, he was an Italian. So nothing happened.

Q You misunderstand my question. You have served as an interpreter before this occasion when you say you talked to Mr. Malanphy at my office; is that correct?

A In your office?

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Q Yes.

A No.

Q Well, Mr. Malanphy's office.

A Before --

Q Before you went up to serve as an interpreter with Dr. Kaplan on March 30, 1975.

A For your office, no.

Q Have you been in Mr. Malanphy's office?

A Before, no.

Q You never served as an interpreter in one of Mr. Malanphy's cases before you went up?

A Before February 10th?

Q Yes.

A No.

Q Is it your testimony that the only time you ever did any work for Haight, Gardner, Poor and Havens, my law firm, if you were ever retained by them, was this one occasion when you went up to Dr. Kaplan's office?

A That was the first time only.

Q That was the first time?

A Yes.

Q You had been up there on other occasions; is that correct?

A Yes.

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Q But at no time before March --

MR. FRIEDMAN: That is February 10th.

Q Before February 10, 1975, had you done any work for Haight, Gardner; is that correct?

A Before, no.

Q And as you sit here, and I am talking now about your present recollection, you have a distinct recollection of the conversation that transpired when you went into Dr. Kaplan's office with Mr. Picinich at the time of this examination in February of 1975; is that correct?

A May I ask you something? My conversation with Mr. Picinich?

Q I want you to tell me, if you can, as you are sitting there now in the witness chair, do you have a distinct recollection, can you recall the nature of the conversation that transpired when you entered the office with Mr. Picinich? I am talking about when you first went in when I think you said you talked to a nurse.

A When we first came in we didn't speak to the nurse immediately. We were waiting in the waiting room first, and then we went to the nurse.

Q Of the people you spoke to, the first person you spoke to in Dr. Kaplan's office was a nurse; is that accurate? Is that what you said?

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A Official person, yes, that was the nurse.

Q And you now remember the conversation which transpired or at least the gist of the conversation which transpired when you talked to this nurse as an interpreter for Mr. Picinich; is that right?

A Vaguely. I remember what it was all about.

Q Is there some particular instance that makes you remember? Was there something about this conversation that recalls it to your memory, which took place in February, 1975, and we are now in October, '75, is there something which took place in this conversation that makes you remember the nature of your conversation after all of these months?

A I remember that day very well for another reason. That may be my recollection of that day, why it is very clear. Because that was my first contact with a psychiatrist. And that was a very interesting day, interesting case. So I remember --

Q Well --

MR. FRIEDMAN: I object, your Honor.

MR. KAIN: The witness is not answering my question.

MR. FRIEDMAN: May he calm himself down?

THE COURT: Let me hear the question and the answer

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thus far.

(Question and answer read)

THE COURT: You finish your answer.

THE WITNESS: And that whatever happened that afternoon, I mean in the doctor's office, it is very clear. At the same time I keep a diary. If you notice, I always put in my book whatever is interesting in a case for my personal reason.

Q Did you keep a diary with respect to the conversations? Did you keep in your diary any notation as to the times which elapsed in these examinations?

A That particular conversation I don't have anything in my book. But when I opened that particular case, that page, then I can remember with my notes, what I have in, what happened. Not exact words, I really can't recollect that. But how and what was happening.

Q Can you tell me, does your diary make any direct reference to Mr. Picinich's conversation with this nurse when you first entered the doctor's office, the first one you spoke to associated with the doctor's office?

A That conversation sounded like routine to me.

THE COURT: No, no, you listen to Mr. Kain. He simply asked whether your diary has a notation about the conversation with the nurse.

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Is that your question?

MR. KAIN: Yes.

THE WITNESS: I mentioned before, I didn't put anything in my book from that conversation.

THE COURT: From any part of the Kaplan examination?

THE WITNESS: No. Only what was going on, how would I say it, part by part. What we did in the waiting room, then where did we go and who we meet.

THE COURT: I'm not clear. Is there anything in your diary about the trip to Dr. Kaplan's at all?

THE WITNESS: Oh, yes.

THE COURT: Mr. Kain, go ahead.

Q Is there any direct reference in your diary with respect to times?

A Oh, yes, that is definitely because I always have to put in my bill when I send to the office, how long I have been.

Q When you send a bill you don't put down Dr. Kaplan examined first for seven minutes, the electroencephalogram took ten minutes, the transportation was X amount?

A No, I put altogether what time I spent in the office, altogether. How much time I spent in the office.

Q Does the reference to the time in your diary refer to travel time?

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A No.

Q Is the only time you bill for the actual time you spend in the doctor's office?

A Yes.

Q And your diary, if I understand you correctly, makes reference to the total amount of time that you were actually physically within Dr. Kaplan's office; is that so?

A Yes.

Q And does your diary with respect to this time break up this total amount as to so much time in the waiting room; it did not, does it?

A No.

Q And what is the reference in your diary to the total amount of time that you spent in Dr. Kaplan's office?

A May I open the page and see?

THE COURT: Yes, please do.

MR. KAIN: May we mark it for identification, your Honor.

I withdraw that.

THE COURT: You what?

MR. KAIN: I asked your Honor if we could mark it for identification and then it occurred to me she might want to take her diary home tonight so I withdrew my offer.

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THE COURT: You look at your diary and answer his question. Have you got that?

THE WITNESS: Yes. That was February 10th. I was asked to be there at twelve and I left the office 1:30, 1:35. But in the same time I had another client there.

Q In the same office?

A In the same office.

THE COURT: So we are not confused and it is awfully late, does the diary show just how long you were at Dr. Kaplan's office or doesn't it?

THE WITNESS: It does.

THE COURT: What does it show?

THE WITNESS: Twelve o'clock to 1:30.

THE COURT: You were at Dr. Kaplan's office from twelve to 1:30 according to the diary?

THE WITNESS: Yes.

Q That is the only time marked in the diary; is that so?

MR. FRIEDMAN: I don't know whether your Honor heard her reference that there was another exam conducted in the same period of time.

THE WITNESS: There was another patient at the same time. I availed my services and we left at the same time for two patients. I was working with two patients

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THE COURT: At Dr. Kaplan's?

THE WITNESS: At Dr. Kaplan's, yes.

THE COURT: Is that difference shown in your diary?

THE WITNESS: No, on the same page.

THE COURT: We are limiting this to your diary now -- can I see the diary?

THE WITNESS: Yes. I don't think you will understand but you can see the figures.

THE COURT: Where is the entry?

THE WITNESS: You see Thomas Malanphy and here are the names. There were two patients. I was asked at twelve o'clock.

THE COURT: And I can't read this very well. The diary does not show how much time you spent for the other person versus Mr. Picinich; right?

THE WITNESS: No, but I know how much.

THE COURT: All right, Mr. Kain.

C Is it your testimony that at present you have a recollection of the amounts of time that you spent in Dr. Kaplan's office with each of these clients or patients; you have a recollection of that, do you?

A Yes, I do.

C And do you also have, after these months elapsed,

a distinct recollection of how much time you spent in the waiting room with each individual, if you did spend such time?

A Yes, approximately I can say.

Q And you also now have a recollection of how much time Dr. Kaplan's examination took; is that also true?

A Yes.

Q And you also have a recollection of just how much time the encephalogram took?

A I didn't hear this.

Q I say you also at present still have a recollection of how much time the electroencephalogram took?

A Oh, yes, that I remember.

Q Now, did you while you were physically present in Dr. Kaplan's office, did you on occasions consult your watch to check just how much time the doctor was using for each one of these people?

A Oh, no. I never do that.

Q Is it your practice normally when you go somewhere to keep tabs on the time?

A Yes, I have to.

Q You break it down?

A No break it down. Only when I get there and when I leave.

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Q And then months later you have retentive memory enough so that you remember the amount of time; is that so?

A Yes. My days are very busy and I really have to take time.

Q Is this the first time you met Mr. Heller?

A Yes.

Q And was Mr. Heller with you on this occasion?

A With me?

Q Yes.

A No, not with me. He was with his clients, not with me.

Q When I say with you, was he also present in Dr. Kaplan's office while you were there, during the same period of time?

A He was with us in the waiting room only.

Q Only in the waiting room?

A Oh, yes.

Q And did he go with you into -- when Mr. Picinich was talking to the nurse, through you, and he didn't go with his client into the examining room or into the electroencephalogram; is that correct?

A No. Only when we were in the nurse's room he occasionally came to see whether I was doing all right because he didn't know whether I can understand that man. But he came

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and left immediately because the nurse didn't want his presence.

Q And did Mr. Heller talk to the nurse in your presence?

A Yes, I think he did.

Q And do you know if on any occasion or at any time during the time you were in the office, whether Mr. Heller spoke to the nurse not in your presence?

A That I don't know.

MR. FRIEDMAN: I object to it. How can somebody know what happened not in their presence?

THE COURT: She answered.

Q Did Mr. Heller speak to Dr. Kaplan in your presence?

A I don't remember that, really. I don't. Maybe a simple hello but I really don't know.

Q Do you know -- you, of course, have no way of knowing whether Dr. Kaplan and Mr. Heller spoke at some time while you weren't there; is that so?

A No.

Q I mean on this particular day.

A No.

MR. KAIN: That is all.

CROSS EXAMINATION

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BY MR. LEONARD:

Q In this trial you first arrived in this courtroom last Monday, did you not?

A Yes.

Q A week ago Monday?

A Yes.

Q You arrived after having been hired by Mr. Heller and Mr. Friedman, didn't you?

A Yes.

Q And you spent time sitting with Mr. and Mrs. Picinich through the entire portion of Monday, Tuesday, Wednesday?

A Only Monday and Tuesday.

Q Monday and Tuesday. Were you here on Wednesday?

A Only Monday and Tuesday.

Q You were paid for your services by Mr. Heller and Mr. Friedman; is that right?

A Yes.

Q Now, prior to appearing here in court did you assist either Mr. Heller or Mr. Friedman in any conversations with either Mr. Picinich, Nick Picinich or Mrs. Picinich before the trial started?

A Oh, that was only one occasion when I was in the office to get my assignment. I was downtown and I stopped of f

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Mr. Heller's office to get the right dates, and I met Mr. Picinich there.

Q When was the first time that Mr. Heller or Mr. Friedman spoke to you concerning the subject of hiring you in connection with this case?

A Oh, I can tell you that, too.

Q Please do.

A That was very short. Oh, yes. That was September 30th, he called me around six o'clock to ask me for the next day.

Q September 30th?

A Yes.

Q You said that when you were in Dr. Kaplan's office back in February of 1975 -- is that the date?

MR. FRIEDMAN: Yes.

Q Mr. Heller was there and you had two clients; is that right?

A Yes.

Q Were both of those clients of Mr. Heller?

A Yes, I think so.

Q Did you speak to Mr. Heller on that day?

A On what day?

Q The day you were at Dr. Kaplan's office.

A Yes, I did. We met there.

Q Now, has Mr. Heller employed you in any capacity with respect to any case other than Anton Picinich's case?

A Oh, yes.

Q As a matter of fact, you testified for Mr. Heller in another case in this courtroom, didn't you?

A No, I did not.

Q I'm sorry, not testified, you interpreted.

A Yes.

Q That was for a case or in a case named Rubinich?

A Yes.

Q Was Mr. Rubinich in Dr. Kaplan's office the day you were there?

A Yes.

Q And Mr. Heller paid you for your services as interpreter in the Rubinich case?

A Yes.

Q By the way, do you interpret more than one language?

A Yes.

Q Were your services, when you rendered Mr. Heller other services were for this Croatian language, or whatever it is?

A Yes.

Q So you worked for Mr. Heller on more than one

occasion, haven't you?

A Yes.

Q Did Mr. Heller speak to you or Mr. Friedman speak to you prior to your appearance here in court today?

A Yes -- for today?

Q Yes. Your testimony here, did he talk to you before this?

A Yes. They asked me last night to come today.

Q Who was the first one that told Mr. Heller that you had a diary with respect to your appearances as an interpreter?

A I don't know who told him because maybe he gathered that because I always have something to write.

Q Have you represented Mr. Heller or Mr. Friedman in any cases other than the Rubinich case and the Picinich case?

A No.

MR. LEONARD: No further questions.

REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q So we are clear the Haight, Gardner, Poor and Havens office asked you to come to Dr. Kaplan's office on February 10, 1975?

A Yes.

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Q To assist in the capacity as an interpreter for two Croation longshoremen, one named Rubinich and the other named Picinich; right?

A Yes.

Q And those two examinations and everything, the waiting periods and everything else is what occupied the twelve to 1:35 time you told his Honor about; correct?

A Yes.

Q And subsequently when it came time for the trials in those two cases you were asked in that instance by Mr. Heller to serve as the courtroom interpreter for Mr. Rubinich's case and then for Mr. Picinich's case, the same two people?

A Yes.

Q That is the only time that you have served or provided services as an interpreter either to the Haight, Gardner, Poor and Havens firm or to Mr. Heller's office; do I have it right?

A Yes.

Q One other question.

You were asked what languages do you interpret. Will you tell us, please?

A Besides Yugoslavian?

Q Yes.

A French.

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Q Now, I take it that you come from Europe. May I ask what you did in Europe. Were you an interpreter there?

A No. My line is, I'm a chemical engineer.

THE COURT: All right, you may step down.

(Witness excused)

THE COURT: Anything else?

MR. FRIEDMAN: The plaintiff rests.

THE COURT: Ladies and gentlemen, we will recess tonight until ten o'clock in the morning where we will be in a posit'on to start the summations promptly tomorrow.

I will talk to the attorneys for just a minute now.

(Jury leaves)

THE COURT: I want to cover two things. The question of the contract which Mr. Kain offered and then I want to rule, as best I can, on requests to charge. I have to do that before summations.

What is the objection to that, that contract?

MR. FRIEDMAN: It is simply a voluminous document which I tell the Court I have not read from beginning to end. I have no idea as to all its detailed contents and I have no idea as to frankly why either I or you, at least at this point in the case, have to take the trouble to read it.

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Why is it relevant to the jury issues?

THE COURT: As I recall it came up the very first in Captain Ash's testimony. There was an objection made. I was shown one paragraph of the contract which defines -- it was the part that generally defined the duty of the stevedore versus the duty of the ship's crew; right?

MR. KAIN: Yes, sir.

THE COURT: Is that all you want to refer to?

MR. KAIN: No, sir. Mr. Friedman on at least one occasion in the course of this trial has made a reference to the fact that the stevedore is paid on a time basis. This, I submit, your Honor, this contract shows otherwise.

THE COURT: Let's define the parts you want to refer to. Or is what you showed me before. I'm sure you don't want to refer to the whole contract; right?

MR. KAIN: I don't want to. Rather than go through it, may I reserve until tomorrow morning so I may have an opportunity to go through it and pinpoint it?

THE COURT: Yes.

Any motions before I rule on requests?

MR. LEONARD: Yes, I renew my motion to dismiss the plaintiff's case.

THE COURT: Denied.

MR. LEONARD: Renew my motion for directed verdict

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in favor of the defendant and third party plaintiffs.

THE COURT: Denied.

You have similar motions?

MR. KAIN: Yes.

THE COURT: Denied.

MR. FRIEDMAN: The plaintiff has a motion.

MR. LEONARD: I have one other motion, your Honor. I move once more, and I must make this motion, to strike the report of Dr. Brown on the ground that the only testimony in the case as to the competence of that report is that given by Dr. Kaplan, who testified that Dr. Brown as a psychologist was not competent to render a diagnosis as to the --

THE COURT: That is denied.

MR. FRIEDMAN: Your Honor, we have two motions. The first relates to the affirmative defense of contributory negligence as to which the defendant bears the burden of proof. On the evidence which is now closed, I respectfully submit there is not a basis for a jury issue of contributory negligence. I will merely say, your Honor, it is most important in these maritime cases, as the courts have reminded us, not to confuse --

MR. KAIN: Speak a little louder.

MR. FRIEDMAN: Not to mix in assumption of risk with

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contributory negligence. No question that the situation here was one of danger and that the man can even arguably was aware or should have been aware that he was in a dangerous spot in being there, but the evidence is uncontradicted that he was pursuing his work pursuant to work orders that he had received and he was up on the roof of that container to perform work, duties and orders that he had received from his superiors. The fact that it was dangerous and that he should have been aware it was dangerous or indeed actually knew it was dangerous does not make it in to a case of contributory negligence. We have reminded again and again by the cases not to go the wrong way on that.

MR. KAIN: May I be heard on this?

THE COURT: I think, as I understand the law, it is error to submit a charge to the jury on contributory negligence where it is clear, or whatever the right word is, that the situation is only one of assumption of the risk. There is some decision by Judge Oakes fairly recently which reversed a case where he held that on the facts it could only be assumption of the risk and there was no basis for the jury to find contributory negligence.

So it seems to me, without going into a lot of research, it seems to me the line is this, but first let me go back to a case I had recently. There was a big pile of

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pipe on shore from a dredge. To go on that pipe is dangerous. A welder is directed to go on that pipe and cut up that pipe. He goes. He doesn't have a choice and there is no evidence that he goes in any way that was unnecessary. There is no evidence that he was skipping or running or balancing on one foot. There is no evidence that he did anything wrong except go on the pipe, which was dangerous. So I felt, and I don't think this is up on appeal, but I felt that was kind of a clear case where I could not charge contributory negligence.

So the line I am trying to describe is if the necessities or demands of work cause him to go to a risky situation and he does so, that is nothing more than assumption of the risk. However, if he goes into the risky situation and in addition to going into that risky situation he does it in some negligent manner, he runs, he doesn't look where he is going, he horseplays, he chit chats or something like that, then that can be contributory negligence. Or, of course, if he is not required to go there and if it isn't necessary and he just walks into the danger willingly, I guess that could be contributory negligence.

Now, what is it? I have expounded that and if you can show me how you fit in, I appreciate it.

MR. KAIN: Perhaps your Honor is misled by my

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pleadings because we do plead assumption of the risk. I state for the record now this is our practice because we have had situations where, for example, a man is not a member of the gang and he is on board and he is injured.

THE COURT: You know you can't defend on that in this case.

MR. KAIN: It is my understanding in a maritime cause of action such as this assumption of the risk does not apply.

THE COURT: So you withdraw that defense?

MR. KAIN: I withdraw that defense. But with respect to contributory negligence -- first of all, with respect to what you say, and if I haven't implied it in my requests to charge, if your Honor is going to make any reference to assumption of risk at Mr. Friedman's request or anybody elses, since I contend it doesn't apply and it is not an issue, I will ask your Honor to charge the jury that the plaintiff, and all other longshoremen, assume the risks inherent in their work. That is not assumption of risk. The normal risks in his occupation of which the negligence of the shipowner or the negligence of --

THE COURT: I am not going to use the word assumes. I think it is confusing, but I will say something along that line, certainly.

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MR. KAIN: With respect to the contributory negligence question, also, as far as I know, no testimony in thisrecord that at the time this plaintiff elected to step from container number four to container number three he was directed to step to that particular container. The only testimony I recall from plaintiff and his fact witnesses is that when they got on board they were told by the hatch boss to go back, work on these containers, get the lashings removed, get them off. But I recall the testimony, and I submit to your Honor I'm reasonably sure there is none, that there is no testimony he was directed to step to that particular container.

THE COURT: Pause there. I think you started out your discussion on the assumption that he was directed by his superiors to do what he was doing. Now I have tried to look rather quickly to my notes. I find nothing to that effect. If I am mistaken I want to know about it. That would make a difference.

MR. FRIEDMAN: I sometimes worry about the jury as to what was testified to last Monday.

However, my recollection of the testimony is that he did testify that when they started to do this they saw the lashings were up on the roof and he was told to get a ladder, go up and get them off.

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Now, if the Court's recollection and notes are to the effect that all of that was just done and wasn't specifically told to do it but in the course of the work he saw the lashings up there and he went ahead and did it; as I understand it, that is what the Court is advising that its notes are to the latter effect?

THE COURT: I will check that again but I think that is right.

MR. FRIEDMAN: That is a so-called weaker case against the one in which he is specifically told. But it is the same case. The testimony is not contradicted, the testimony by Picinich, Morich and indications by Langan again that this was part of the work, they had to go.

Let me go further since your Honor stimulates my memory on that question. I think there was testimony uncontradicted and I can't put my finger on whether it was Captain Ash or others, but someone specifically said that if it was left up there and that those things happened, and I think more than one witness so testified, then it is part of the longshoreman's job to get them down and out and not to permit them to sail off the ship with the container to which they are still attached.

THE COURT: What I was trying to do a minute ago was to try to give a legal framework. Now, I think would

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you agree or wouldn't you that as a matter of law if the man has a choice as to how he is going to do the particular work, what path he takes to get there, whether he does it now or at some future time. In other words, let me bring it to this case. Let's suppose in general he was required as part of his employment that morning to get up on that second container and get those loose lashings off. I think that is pretty clear. To do that in general would simply be assuming the risk of his employment. I will agree on that. Let's suppose he has a choice. He can either do it after the crane has lifted the first container or he can do it at the same time it is lifted. He could have a choice of perhaps waiting on the forward container while the movement goes on. So that he isn't compelled to do it in the precise way he did it.

Now, it does seem to me that if he has that scope, so to speak, then that is all contributory negligence ever is.

MR. FRIEDMAN: First I would expect when the notes are studied and/or the transcript is studied, I have a recollection that the course of work emanated from an instruction from a superior.

THE COURT: We will check on that.

MR. FRIEDMAN: Subject to that or if that is not in

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the record which is now closed, if that isn't proof even in the case then we are stuck with it. We still have the aspect that there is no evidence that there was another way to proceed. Certainly you couldn't have the lashings --

THE COURT: Would you agree with me as a matter of law --

MR. FRIEDMAN: Another reasonable way to proceed is you can't charge a man with contributory negligence because one can conceive at this point of some other possible way of doing it. There is always one or in most cases you can conceive of some other possible way. I think one must reply was there a reasonable pragmatic way that should have commended itself to this workman that he rejected?

THE COURT: I would say that is a jury question.

MR. FRIEDMAN: Yes, if it is something in that area. But merely saying that one can now conceive of one possibility doesn't make it a jury possibility. One has to recognize a possiblity that is within at least the parameter of a reasonable thing to expect or impose on the man.

THE COURT: I would agree with you as a matter of law. The question is is there enough to go to the jury on that basis?

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MR. KAIN: May I be heard, your Honor?

THE COURT: Yes.

MR. KAIN: The whole purpose on my part in bringing in this testimony about the plane of the falls and the path of the draft was to explain Captain Wheeler's statement that in his opinion it was improper stevedoring practice and unsafe for Mr. Picinich not to have stepped either where his co-worker did or --

THE COURT: I can't hesitate from saying that you didn't ask that.

MR. KAIN: I believe the question was asked.

MR. FRIEDMAN: Everybody put their hand on that stove and pulled it away.

MR. KAIN: I have a distinct recollection that I raised questions of this in my cross examination of Captain Ash and I believe I raised it, at least I intended to raise it --

THE COURT: It is in the case. I get you. But what do you say was or what would you argue to the jury constituted contributory negligence on the part of the plaintiff as distinct from assumption of the risk?

MR. KAIN: An experienced longshoreman electing, insofar as the record shows, at his own option to step to this container and remain on this container within the plane

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of the falls and the path of the draft while this one is being moved, instead of moving outside of the plane of the falls by stepping to containers one or two. Just that. If nobody told him to go from four to three and stay there while this is being raised.

THE COURT: I will rule this way: I will look over my notes tonight. It may or may not be a jury question of whether he was directed to go onto that second container and do that work. I don't have a precise memory. Even if he wasn't specifically directed he obviously was required to do it. But I do believe that I will charge the jury, and you ought to all know this, I will charge the jury on contributory negligence to this effect: I will say that if the plaintiff was required to go to this spot and do that both either by orders of his superiors or because he would reasonably believe it was required in his work, to do that is not in and of itself contributory negligence. But if he took that job in a manner which was not reasonably necessary and in a careless manner and there were other more safe ways to do it, that would appear to a reasonable person that that would be contributory negligence. The defendant has the burden on it and as far as I know now I would so put that to the jury in that way.

MR. FRIEDMAN: Will your Honor's charge include

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that he is not under a burden to have assumed or be aware of, and this is poor verbiage, that the container on which he was standing was going to move; that he is entitled to assume that the working surface is accorded on a ship is a stable one.

MR. LEONARD: It is a jury question.

THE COURT: Wait a minute. I think that is right as a proposition.

MR. LEONARD: Your Honor, may I comment?

THE COURT: Well, he is not required as part of his duty of care to anticipate negligence and unseaworthy and unsafe conditions. I think that is part of any standard charge.

MR. KAIN: He is required, if your Honor please, as part of his standard of care as an experienced longshoreman, he is required to know what is good stevedoring practice.

THE COURT: What Mr. Friedman just suggested I have to think about. That is the whole idea of contributory negligence. He may not be solely at fault and you may have a situation of negligence on the part of the shipowner or unseaworthiness and you still have the plaintiff contributorily negligent. I have to think that out.

MR. KAIN: With respect to your Honor's comments on how you thought you would charge the jury, may I ask your

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Honor to include within such a charge, assuming your Honor gives one, the element of time. By that I mean obviously if the testimony or the record supports the statement that he was told to go to this and remove it, it becomes material --

THE COURT: I think I included that in my earlier remarks.

Can you please get out your requests now.

MR. FRIEDMAN: Judge, you have asked us to deal with a question. I would like to read it into the record and hand it up.

THE COURT: I would like to cover the defense requests now for the moment.

MR. FRIEDMAN: What about the additional requests? You asked for those.

THE COURT: Then I will do all your requests in a minute.

MR. LEONARD: Before you make any ruling, your Honor, I do have supplemental requests.

THE COURT: I cannot rule now on requests given to me unless they are extremely simple and we have discussed them earlier. So anything given to me, and I'm not guaranteeing I will take time to give you rulings tomorrow.

MR. LEONARD: They are extremely simple, your Honor.

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THE COURT: On the Haight, Gardner requests, when I say granted I mean granted in substance. I will not use the exact words. If I vary in any material way you can remind me when you take exceptions.

One is okay. Same for two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen; fourteen I will not grant. I will give a somewhat different charge on credibility.

MR. FRIEDMAN: Did you say thirteen, your Honor?

THE COURT: Thirteen is okay.

MR. FRIEDMAN: Are we with Haight, Gardner on thirteen?

THE COURT: Thirteen is okay, fourteen is about credibility. I will not give that precise charge, but I will give an adequate charge on credibility.

Fifteen, of course, is okay.

Now, damages: sixteen is okay. Now, seventeen and -- seventeen gets into this problem of mitigation which I will have to discuss with you further, so I will reserve on seventeen.

Eighteen I will have to check the case, and I apologize for not doing it. I don't know whether I should give that charge or not.

MR. FRIEDMAN: Judge, have you seen the Feldman

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case that came down a couple of weeks ago?

THE COURT: I haven't seen that.

MR. FRIEDMAN: Judge Bloomenfeld wrote a non-jury decision considering the inflation factor. The Second Circuit just came down with essentially --

MR. LEONARD: There isn't any claim for future lost wages in this case.

MR. FRIEDMAN: You are quite right about that. That is the better answer.

THE COURT: That is the better answer.

MR. KAIN: Same thing is true of nineteen.

THE COURT: Eighteen is academic and nineteen, of course, is academic.

Now, 20 is granted.

On the business of whether he should have worked earlier than the ten months, is there any real evidence that he should have worked?

MR. KAIN: Only indirectly by references to Dr. Zitani or something but it certainly hasn't been pushed in this trial.

THE COURT: I think that is a red herring.

MR. KAIN: A reference concerning some of the medical reports referred to.

MR. FRIEDMAN: May we go back to 20? I think the

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law in this circuit is settled that income taxes are not referred to the jury in any way.

THE COURT: Judge Motley referred to it in any way. I will check the case.

MR. FRIEDMAN: I didn't take exception, if you think it is important.

THE COURT: I haven't had time to look at it but I will.

Are you going to insist on arguing he should have gone back to work before? I think it is a red herring.

MR. LEONARD: We have the report of Dr. Winokur put in by the plaintiff and Dr. Winokur finds he is objective okay.

THE COURT: As of what date?

MR. LEONARD: As of August 16, 1971.

THE COURT: I will grant it.

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RDP

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ANTON PICINICH

71 Civ. 5357

vs.

CHRISTIAN HAALAND etc.

October 17, 1975

MR. KAIN: May it please the Court, Mr. Foreman and ladies and gentlemen of the jury:

We have come now to a point in this case where each of the lawyers representing the various parties have an opportunity to come before you and to tell you what they think the testimony in this case has shown.

Of course, what we think and our recollection of what has transpired in the course of this trial is necessarily colored, I suppose, by our own closeness and by our pre-conceived concepts, and I am sure his Honor will tell you that what I say to you, what Mr. Leonard says to you, what Mr. Friedman says to you -- none of what we say to you is evidence.

I am sure his Honor is going to ask you to rely on your own recollection of what each of the witnesses said.

I know this trial has consumed two weeks, and it may be a little difficult to remember exactly what was said by all of the witnesses, but you have been very attentive during the trial, and you had an opportunity to listen to the

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testimony and see the witnesses and, I am sure, to evaluate their testimony. So let me ask you to rely on your own recollection of what was said, not mine, not Mr. Leonard's nor Mr. Friedman's.

In essence here, his Honor is going to tell you that we have two theories of liability upon which my client is liable. The plaintiff says we were negligent, and I am not going to attempt to define this for you, because the Judge will do this, and he says the ship was unseaworthy.

It is our contention that nothing has been proved that would show the ship owner was either negligent or that the ship's equipment was in any way defective. We contend the negligence, if any, is the plaintiff's negligence or the negligence of his co-employees, and we contend that there was nothing wrong with the equipment we had aboard the ship.

Now, just let me, if I may, briefly -- and I don't intend to try to go back and give you a blow-by-blow description, and I hope I am not going to get emotional, and I am not going to ask you to do anything but to rely on these facts and rely on your experience, your own common sense, your own ability to evaluate.

As the Judge pointed out to you, you will recall, you do things every day and do as you took an oath to do,

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without fear, favor, sympathy. Just let me, though, tell you what I think the testimony has shown.

Now, first of all, this ship came in with seventy-six containers on deck, and let's just focus for the moment on the off-shore side at Number 3.

The plaintiff's testimony is --

THE COURT: You mean Number 5.

MR. KAIN: Number 5. I am sorry.

His testimony, and the only testimony I heard with respect to this off-shore stowage, is that this container was being removed (indicating). You will remember Captain Wheeler's diagram showed you had to take off at least one of the upper ones on the insore side of Number 5 because of these internal runner angles, which you will remember, to move it over.

The plaintiff also told you that there were longshoremen working inshore on the starboard side, eight men, two men working down on deck, he and his partner up on these containers, and there were longshoremen working on the inshore side.

So the testimony of the plaintiff is that as -- and let's talk for a moment and let me refresh your recollection as to what the plaintiff himself said. He said they put the hooks to lift off this container, and plaintiff put

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them on the side originally, and the later testimony was that it was an improper way to do it, but that is what he said he did, and this was lifted off. It was brought all the way up and across.

The boom was properly positioned, but he specifically said, in answer to direct questions, that "I did not feel any bump. There wasn't any movement on the container on which I was standing, no movement at all." He heard some scraping, and he said he was at the forward end, you will recall, bent over, and as this after container cleared, as it cleared, suddenly, for some reason unknown to him, this one went in four to six feet on the inboard container (indicating).

Now, he said as a result of this container shooting suddenly inboard he went overboard into the water. You will recall his testimony how originally he said he was hoisted up onto the pier. He later, on cross-examination, conceded that he had climbed out, because it's five or six feet. He was assisted up with the life ring, and he went to the hospital, and he told you what happened to him, that he was out of work for ten months, and he described to you what he did.

For the moment at least I don't want to talk about anything but the factual aspects of this case.

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Then he was followed by Mr. Morich, who gave precisely the same story: no movement. Mr. Morich was on the container forward of this. No movement, no bumping, nothing that he knew caused it. Suddenly it moved in. No explanation.

It is my recollection that the plaintiff did not know where the booms were spotted. It is also my recollection that Mr. Morich hazarded a guess that Mr. Morich was somewhere forward of the outboard container here. I know, and I have a distinct recollection, that Captain Ash said it should be spotted over. Captain Wheeler was of the opinion that it should be spotted directly over that outboard concainer. Mr. Lannigan did not know where it was spotted, but the mark is still there, the X, still there where he thought it should be spotted.

If you will recall, Captain Ash then came on the stand, and Captain Ash, I submit to you, was unable to give any logical explanation which would account for this movement inshore. He talked about imperceptible combinations of forces. He talked about tugboats going by. He talked about tides. He talked about transferring water within the ship, and he had no explanation.

Then we had, if you will recall, the long week end, and Captain Ash came back on Tuesday morning, and Captain

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Ash then gave as his opinion that when this was picked up, again for no plausible reason but for imperceptible reasons, this container swung, striking this one, causing this one to swivel.

This was Captain Ash's opinion, apparently arrived at after some thought over the week end.

Captain Ash was, in turn, followed on the stand by Mr. Lannigan. Mr. Lannigan told you how he just happened to be in Mr. Heller's office and in the course of conversation it was mentioned that Mr. Picinich had a case, and then Mr. Lannigan recalled that, oh, yes, he remembered this case, and he had seen it happen.

Then Mr. Lannigan came into this courtroom, and he got on the stand, and what did he tell you? He told you that, one, his gang had completed the discharge of twelve containers from Number 4 hatch; that the ship's officers had opened -- the ship's crew had opened Number 4 hatch, which is a mechanical or MacGregor type hatch, and that in preparation for the discharge of the cargo, general cargo from the tween deck, he had gone forward to a ladder at the forward end of Number 4, and he was going down, and he put his right foot over onto this ladder.

Now, this is part of what we asked you to do in the beginning: to use your common sense. If this is this

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hatch square, and if I stand in front of it, this edge of the booklet being the hatchcoaming, if I put my right leg up and over that hatch coaming to switch on to that ladder, I submit to you that I turn inshore. I necessarily have to. I am looking aft. This is the offshore side (indicating). This is the inshore side (indicating).

So what he described, I submit to you, using your common sense, would cause him to turn inshore.

But something else I submit to you is even more important. He was very emphatic as to the fact that all containers had been discharged from Number 4, and he was confronted by Mr. Leonard on cross-examination with the stevedores' activity sheet, that shows what these various gangs were doing at particular times.

You will recall that it shows somewhere around ten o'clock the containers were discharged at Number 4 hatch. It was my recollection that Mr. Lannigan fixed the time of this accident at approximately nine-thirty to 9:45.

I submit to you the plaintiff in his examination before trial testified under oath it was about twenty minutes after eight. The ship's logbook records the time at 8:50. I don't at the moment recall the time on the stevedores' accident report, but it is fixed certainly at some time before nine o'clock.

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There is no question from the testimony of all the witnesses, including the ship's chief officer, that at the time of the plaintiff's accident there were seven containers on the port side of Number 5. There were some containers on the inshore side. We know at least there had to be the top one gone.

Now, I ask you what reason, what possible reason, what suggests itself to you that the gang at Number 4 could remove all twelve containers while there were still seven containers remaining offshore at Number 5, and while there was an indterminate number inshore at Number 5? But that is Mr. Lannigan's testimony.

Now, Mr. Lannigan said he did not see the accident, that he heard a noise, which he described, I think, as a thud, that he looked up, and he saw -- and I recall him waiving his hands -- he saw Mr. Picinich off balance. He then saw his body, as he recalled it, falling free over the side.

I just want to call your attention to the fact that at the time Mr. Picinich said he was bent over, he was pulling on one of these wire lashes.

Captain Wheeler testified, and you will recall there wasn't any real disagreement on cross-examination by Mr. Freedman, that you could not see all of his body, that

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had he been standing up, because of the line of sight and the elevation from where he was standing, which was a distance described to you, and the line of sight, you could only see the upper part of his body. If he was bent over pulling the wire, I submit to you it is inconsistent to believe that you could have seen any part of it.

But the one thing I am absolutely sure of, the silent witnesses, the documents prepared at the time, which show when this stevedoring activity took place, make it absolutely, conclusively true that it did not occur in the fashion Mr. Lannigan testified. It did not happen at nine-thirty or 9:45. There is no way that at the time of this accident, Mr. Picinich's accident, that all of these containers had been removed.

That is why we ask you to use your recollection, use your common sense, pay attention to the testimony.

Then, again just briefly reviewing the testimony, Mr. Vangsnes, who was the ship's mate, and who, incidentally, no longer works for the ship owner, came here at our expense to testify. He told you that he did not see the accident. He told you the condition of the containers when he got back aft. He told you that he had made a logbook entry at the time, and he was subsequently confronted with an accident report, and he was asked why didn't he put that in, too.

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It was his recollection that he got that some time later in the day,and it is my recollection he told you he did not know when.

You are going to have to evaluate the impression as to veracity and truthfulness of all of these witnesses, including Captain Vangsnes. I submit to you, in my opinion his failure to include all of this in the logbook may have been an oversight. I don't think it is a serious one. I don't think it is an entry that is required, and he testified he was not required to put the stevedores' records in, and it is in evidence, the stevedores' safetyman's report.

If you want to read it, you may read it, and you will see it is prepared by a safetyman, and it is not an eyewitness report.

Again I ask you to use your common sense. Does the vessel's chief officer, who concedes he has no reason or concedes, rather, that he did not see the accident, and nobody on the ship that he knows of saw the accident -- what suggests itself to you as a reason why he would attempt to withhold any information from his owners? Would he do it on the basis that this is necessarily the result of the accident and was going to necessarily result in a lawsuit? That is something you will have to evaluate.

Should a ship's officer assume that anybody who is

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injured, there is an immediate lawsuit behind it? I don't know. That is for you to decide.

But you then have what I think, in my opinion, is the only graphic testimony before you as to how these lines of force work, how a house fall works, what happens when these various forces are applied -- and I am not a rigging expert; I am not a stevedoring expert, but I submit to you that thse two diagrams which I have before me, Defendants' Exhibits P and Q, are the only attempt by any witness to show you at least what happens in the discharge of cargo, what forces are involved, how it is done, what happens when various things are done in the course of a discharge.

I don't propose to go over all of this to explain it to you. Captain Wheeler did. Nobody has made any other attempt to do it.

He showed you -- and he illustrated when he did so -- that if this boom had been plumbed over Number 2, as he told you, as shown on that diagram, Number 1 could be lifted -- assuming good winch operation, and let me mention this for a minute: this is the longshoreman winch operator in the control station you see here at 1-A. That is not a ship's employee. That is a stevedore employee.

I tell you, and I anticipate his Honor will tell you, that if this winch operator becomes confused or does

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not do his job rightly, or, to borrow a colloquialism, momentarily goofs off, that does not make the ship owner liable. That is not the ship owner's negligence. That is his individual negligence.

Our contention is that we were not negligent in contributing to this accident, that we did not do anything that we should not have done, and we contend there was nothing wrong with our equipment and nothing wrong with the stowage and nothing wrong with the lashings which we provided.

Now, for a moment let me just talk to you about the testimony on the propriety of the stowage. The only testimony before you in this case as to the propriety of the stowage is the opinion testimony of Captain Ash and Captain Wheeler, and Captain Ash, who concededly -- I am sorry. Also, Captain Vangsnes testified. Captain Ash told you that it was in his opinion an absolute requirement that there be stacking plates, that there be premeasured lashings. He brought in exhibits from a Peck & Hale catalog, and he told you this is the way, in his opinion, this cargo should have been stowed, notwithstanding the fact this is a dry cargo ship.

He also expressed the opinion that if it was necessary to modify a dry cargo ship that carries containers on deck, to put on these particular type stackings, he

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mentioned you could put a steel beam, and you could install, in addition to the steel beam, you could install different pad eyes at various places on deck, in other words, substantially modify the deck of the ship in order to carry these in the manner which Captain Ash said was necessary in order to comply not only with good seamanship but in order to comply with proper stevedoring practices.

He told you, in effect, this is the only proper way that this cargo can be put. He talked about how necessary it was that these lashings remain on these containers properly secured until just about the instant they were lifted, that in his opinion it was improper to cut any of these lashings loose as a group because of the instability.

I was surprised by the fact, because it was something I did not expect. He said that is not so. When they were loaded in Damman they did not have to be lashed as they came on board. They were stable enough. It did not require it. Only when they were taking off.

Here again, this is something you are going to have to decide. Does that seem logical? What reason suggests to you that they are stable enough when they are loaded, but they are not stable when they are discharged?

Here again, let me go back to the silent witness. What does the logbook say? The logbook says they were loaded

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in Damman; the ship sailed at four o'clock in the morning of the 29th when they were loaded, and they were loaded and the ship sailed before the securing had been completed, and the crew, according to the logbook, worked until five o'clock that night, thirteen hours, approximately, to complete the securing of this particular stow on deck, these containers.

There is no entry in the logbook that these containers were falling or they moved or whether there was any untoward incident resulting from the fact they were not stowed properly.

Now, they came into New York, and again the logbook shows -- and the Captain read it to you -- Sunday, the day before this accident, all of these lashings were taken off by the crew, turnbuckles turned loose. What happened? Did they all fall?

If Captain Ash is right, why didn't they fall off on Sunday? They had to wait until Monday, waiting for the imponderable conditions Captain Ash talked about, none of which he could spell out for you.

There again, nobody has testified and there isn't any evidence in these cases that out of the seventy-six containers why this was the only unstable container, this outboard container at Number 5.

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It has been a long time since I had any physics, but I recall, under the elementary laws, that a body at rest tends to remain at rest unless something moves it. This container weighed two tons. No dispute about that, and there is no dispute about the fact that this container had four bearing surfaces. Not like when it is up in the air. It had four bearing surfaces.

The only testimony in the case is about a thousand pounds of weight on each of the four corners.

What caused it to move? Where did the force come from, if it moved? And I say if it moved, because I wasn't there, none of my ship's officers or crew were there -- if it moved, and the plaintiff's witnesses are the people who say it did, I believe that the explanation offered to you is ridiculous. But here again, you rely on your common sense. If it moved, considering the rig of this cargo, the way it was described to you, looking how the operation works and the force is applied, what caused it to move? Where did the considerable force, as Captain Wheeler testified, where did this considerable force come from?

This inshore container -- and we are not talking about a piledriver or a battering ram. The movement of this container is controlled by the falls, by the two wires. Captain Wheeler pointed out to you that if in discharging

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this you handle your up and down fall correct, taut, strain it, and use your Burton fall correctly, you move it. What brings it back when it is moving? If it is moved incorrectly and if this fall is not handled correctly, I submit to you the only logical explanation is that it is through the negligent act of the man who is operating, who controls the movement of these falls?

You can hear all kinds of explanations, but I submit to you nobody is going to give you an explanation that is going to say, and there isn't any testimony that there was anything wrong with the rig of the house fall or there is anything wrong with the way this rig is made. My recollection is that nobody, including Captain Ash, said that this rig was improper.

It had to be, I submit to you, if there was an improper movement of these, it had to be the negligent acts of that longshoreman winch operator.

I also submit to you that on the basis of the testimony, as I understand it, even assuming the negligent act, I personally have difficulty in understanding where the sufficient force comes from. We have Mr. Lannigan's testimony when he got there, twenty minutes after, after he had been down at the tween deck, and he went back, he found this top one still askew. My recollection is -- and

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here again please rely on your own, not mine, is that this one was gone, and this is in effect the way he found it (indicating). I think he used the word "askew".

Here again, where is the direction of the force that drives this container in this fashion? Is it logical that a two-ton object, bearing, as it does, on four corner castings, and that is not disputed -- what does it pivot on? Is there some central place? No. It has to pivot on the corners, all four of them.

Are they metal to metal? No. They are on a strip of dunnage. You will have to assess the effect of wood dunnage.

I think Captain Ash -- and I found this incredible -- was of the opinion that dunnage, wood between two metal surfaces, enhances the possibility that it will move easily. In other words, it is a question, and I leave this to your good sense, is the friction co-efficient where you have metal to metal more likely to move more easily than if you had wood in between? That is for you to decide.

Captain Wheeler says no. Captain Vangsnes says no. Captain Ash says just the opposite.

Now, I wasn't there, and I can't give you an explanation. The plaintiff has attempted to give you an explanation which I submit is totally unbelievable. You

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you will have to decide whether perhaps Mr. Picinich lost his balance or perhaps he was pulling on a wire and suddenly it came loose and then he went over the side. You will have to decide whether not only that is how the accident happened, but I submit to you that unless you believe Captain Vangsnes made out his logbook entry out of the whole cloth, you will have to believe that somebody, because Captain Vangsnes so testified, somebody among the longshoremen told him that the accident happened when Mr. Picinich lost his balance.

But I submit to you nobody has given you a logical explanation. I don't think anybody -- and I hope nobody did convince you that an empty container coming in this direction, even if it were to bump, could perform the act of moving this over like that (indicating).

Again, I ask you, use your own experience, your good common sense.

Now, let me just touch briefly on the medical. You heard the doctors. You have heard the medical testimony. I just want to point out to you that you have not heard any testimony by any treating physician, and you are told that although Mr. Picinich did go back to work ten months later, he went back in three months, and he worked a day and a half and came back at the end of ten months, and he has worked since.

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They tell you that he is depressed, and he is apparently anxious. I think there is talk he has resentment and that he is anti-social and that he does not enjoy all these social activities.

I think you will have to concede that all the doctors who have testified have told you that none of them, nobody, had any knowledge of his prior condition as to his mental state.

Undoubtedly, somebody is going to suggest to you that if Mr. Picinich had any of these symptoms prior to his accident, why doesn't the defendant or the stevedore prove it? Here again, I ask you to rely on your common sense. If the treating doctors make no mention of this and if it is only by doctors who examined him, not as treating doctors but as examining doctors, and, I submit, in preparation for the claims aspect of this case -- if they reported, and it is not recorded by Dr. Santoro, the treating doctor who treated him, is there any significance to that? Is there any significance to the fact that the hospital record at St. Mary's Hospital in Hoboken notes he was fully oriented, alert, ambulatory, said he has bruises, a hematoma on the side of his face, a contusion on his arm and his ribs, is there any significance to that?

Mr. Picinich's son-in-law and his wife tell you

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that this aspect of his personality also transpired or resulted since his accident. I don't have to say, of course, that Mrs. Picinich and the son-in-law at least have an interest in this case, as does the ship owner, as does the stevedore.

You are going to have to evaluate this.

I think it was generally conceded by all doctors who testified before you that in addition to traumatic aspects, or whatever part trauma may have played in personality changes, that the wear and tear of living also plays some part in it.

I think it was mentioned later the fact that he was suddenly taken by surprise, and he was precipitated over the side, and I submit logically I would think that is a traumatic experience. But I think I would consider that being struck suddenly by a keg of olives in '68 might have been a traumatic experience, in June of '68. And perhaps being struck across the face and having his nose laid open or broken or whatever it was, the facial injury he had from a broken wire, might have been termed a traumatic experience in April '74. Ar s fall from a ladder in May '74, during which time he was, or as a result of which he was twenty-six or twenty-seven weeks out of work.

Maybe, I submit to you, some of these were

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unexpected and traumatic experiences. Maybe these were unanticipated at the time of their occurrence. These are all things you will haveto decide.

In conclusion, I just want to call your attention to the fact and remind you, as you have been told, which you have agreed to, been sworn to, not to decide this case out of fear or favor, that under our system this is the only opportunity that any of us have to have our day in court.

We are not deciding this by a trial by combat. We are not asking Mr. Picinich to put his hand in boiling oil in order to ascertain whether he is telling the truth. We have, with some assistance, I think, from the English, come up with a jury system, and it is working, and its success depends entirely on how the jury evaluates and what the jury does, and I do, and I think most of the lawyers and judges all agree that assuming you have an opportunity to have jurors evaluate -- it may not be a perfect system, but it is the best we have.

You are people from all walks of life, all different backgrounds, different education, different jobs. The reason I mention this is because I want you, in considering this case, to think about these small aspects.

How do you evaluate that a witness is telling the truth, such as Mr. Lannigan? It is important whether at

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the time of Mr. Picinich's accident, all of the containers at Number 4 were off the decks? Does it play any part in Mr. Picinich's accident? Of course it does. It becomes important, because it is some indication of the validity of the recollection of Mr. Lannigan as to what transpired. He did not equivocate; he did not say "Maybe." He told you flatly, unequivocally, that this was so. Then he told you precisely where he was and where he was standing and how he looked. He did not say, "I was over back of the containers on the inshore side" or "I was back of the containers on the offshore side. I was right there, going down into that hatch, and I could see him for that reason. I was forward; I heard a thud; I looked."

He did not tell you he was facing inshore, but he looked. That is what makes it important. It helps you evaluate the witness, and that is true of any of these witnesses.

Is it important that Mr. Morich and the plaintiff said that this was all the way clear (indicating)? I think that is important. They are the only people who had an opportunity to observe the movement of these containers. Mr. Lannigan told you he did not see any motion of the containers; he did not see anything when he went there, except the plaintiff going over the side.

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Captain Ash, the ship's officers did not. Captain Wheeler did not. Just these two men. They did not tell you there was any bumping. They did not describe any movement from one side to the other.

You may say, "Well, Mr. Picinich did not know, because he was in the water." But Mr. Morich told you the same thing. How good is his recollection? They did not hear any bumping; they did not see any bumping, and they did not find any motion in this container at all, either one of them, on their testimony, until this one was clear eight feel in the air.

They told you that no movement started on this container until this one was clear, and for a while there I thought we were going to be subjected to a claim that these had moved uphill sudeenly.

If you look at the stowage and the testimony as to the camber of the deck, that is not something that we got as a defense. That comes off the ship's plan. Captain Ash even had to concede the camber. He did not know the amount of it, but the ship's plan shows it was sixteen inches. But until the fortuitous arrival of Mr. Lannigan in Mr. Heller's office, nobody had any explanation for this except that this container moved uphill against camber. Then, fortunately or unfortunately, depending on your point of view, in comes

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Mr. Lannigan, who just happens to recall that he knows all about this case, and he provides not another explanation as to the forces or the blow.

Isubmit to you, is it possible somebody thought this was not too plausible an explanation? Coincidence, if you will?

Captain Ash never, until after the fortuitous finding of Mr. Lannigan, never, never expressed any idea that this container was knocked askew. When it was knocked askew, if it was, how about the effect on the front ones? No testimony on that. But he did not offer any explanation for that until the very day that Mr. Lannigan, who discussed it with nobody, who did not even talk to Mr. Friedman or Mr. Heller about what transpired until the very day that Captain Ash discovered, strangely enough, and so did Mr. Lannigan.

In conclusion, may I just say that this is the last opportunity that I will have in this case to talk to you. I mention it only because it is possible only in the summations or Mr. Leonard or Mr. Friedman, somebody will say to you that if what Mr. Leonard says or Mr. Friedman says is so, why doesn't Mr. Kain get up and state his version? Why doesn't he attempt to rebut that?

The simple answer is, I am not permitted to. So I ask you, please, rely on your recollection, your own

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recollection. I think you owe that to all of the parties, your recollection of what the testimony was, your recollection of what the witnesses said, what the exhibits showed. If they concur with my recollection, Mr. Friedman's recollection, somebody else's recollection, that is fine. But if it is at variance with my recollection or anybody else's recollection in this case, since you are the sole triers of the facts, I ask you to please rely on yours.

I ask you to use your common sense, and both I and my client are confident that if you do so, your verdict must necessarily be that this ship owner, whatever the cause of this accident, was neither negligent nor was the ship or its equipment unseaworthy.

Thank you.

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(In open court - jury present)

THE COURT: Mr. Friedman.

MR. FRIEDMAN: May it please your Honor, Mr. Foreman, ladies and gentlemen of the jury and my distinguished and able adversaries, and Mr. Picinich:

You must understand what I, the other lawyers, the witnesses, the Court is saying but whose substantial interests are in your good hands, as well as the substantial interests of the shipowner.

This is a case, as any case is and should be, between Mr. Anton Picinich, an individual, and a company that owns this ship, apparently other ships. They are both entitled -- the McGrath Corporation, as his Honor has indicated, has an interest in this case, an interest that will be decided by the Court, as they are free to choose, and not have that submitted to you. They are, of course, affected by this case which is why Mr. Leonard arose to speak.

It is a case between those parties, ladies and gentlemen. It is of extreme importance that you judge it in a way of giving equal and fair concern, without any partiality to any interest, and not to be led to any kind of judgment of the case as to the qualities and the nature of any of the personalities of any of the counsel who appeared before

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you. Mr. Heller and I have appeared for Mr. Picinich and obviously experienced counsel have appeared for the shipowner and the stevedoring company. They are entitled to your fair consideration and no less consideration Mr. Picinich is entitled to.

I don't have the experience in maritime matters that these two gentlemen devote themselves to, but I hope I am an appropriate advocate of Mr. Picinich's interest. Again I hope they would wish no less.

I don't think they can make an argument that the resources that Mr. Heller and I can bring to the gathering of evidence in a case of this sort is anywhere near the equivalent that they and their offices and representatives can bring. I think that is not a totally unimportant consideration in this case. You have had seven trial days, if you will recall. Today is the eighth day that we actually sit. Seven days were devoted to taking of testimony. There have been a number of witnesses who have appeared. The defendant's total presentation of witnesses in this case were three: a chief officer of the ship which had 40 crew members, according to Exhibit 4, and he says he has no personal knowledge of the happening of the accident, and nobody else from the ship is brought at all.

Mind you, it is not an issue alone of somebody

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seeing the incident of the fall. We can safely accept the idea that when the man fell unexpectedly, unintentionally -- I mean nobody intended that he fall -- totally unanticipated not only as to him but as to anybody else, and over he went, that few people would have an opportunity to see that moment of the fall. But that is not the only aspect that has been relevant. You have heard such an avalanche of testimony as to stacking devices, dunnage, the position of the containers, various other aspects that many people could have testified to. It didn't have to be -- I mean the failure to bring in witnesses to all of those elements is not answered by saying that the 40 crew members were at breakfast and nobody happened to see the moment of the fall, if that is so. It is not an answer not to bring in anybody else because there were other issues and items of testimony.

Indeed, just to sort of go a little bit out of order, such an argument has been made that Mr. Langan didn't have a line of vision standing six feet tall at the forward end of number four hatch to place on the horizon where Mr. Picinich was sixteen to 22 feet, to take his six feet, up in the air, some 35 feet away at that angle.

And notice who testified there was no line of vision to that effect? Mind you of the two witnesses, excluding Dr. Kaplan and his area of authority in this case.

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As to the liability aspects there were two witnesses only: the chief officer and Mr. Wheeler. Who testified that there was no line of vision? Not the chief officer. He never testified. The only testimony we got from the chief officer, and talk about my skills, I can tell you this: they say never ask a question you don't know the answer to. Never put your head in the lion's mouth. Certainly that chief officer had been here any number of days, had been prepared by counsel for the shipowner, had gone over the case and was certainly no friend to the plaintiff's side of this case. I took the liberty of sticking my head in the lion's mouth and having him demonstrate the line of vision on the ship's plan. Never did they come back and ask him to say but this, but that, there was no line of vision in fact. Never. Think about it.

Who testified there was no line of vision? A man who has never been on the Concordia Viking in his life, who is 300 times in the past number of years appeared as a professional witness in maritime cases. He makes his living this way and who hadn't, indeed, been to sea in 20 years. I mean, of course, Mr. Wheeler. Only he so testified, against the authoritative statement by this hatch boss. A trusted supervisory employee of McGrath Corporation, who by one word rendered invalid the representation Mr. Leonard made to you a

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few moments ago. He said the longshoremen travel about working for different companies. The hard fact is --

THE COURT: Keep your voice up?

MR. FRIEDMAN: I'm sorry.

The hard fact is Mr. Langan pointed out he has been an employee of McGrath Corporation and I recall the number of fifteen years. It may have been something different, but it was in that range. So what little evidence we have about people being long-time employees of different corporations, it just doesn't go in Mr. Leonard's direction.

Sometimes I sort of get started in a summation a little improperly by responding to little points that bother me. It does bother me that Mr. Leonard should think that his version of a fair contest, for a man whose life is at stake, who has his day in court, the so-called legendary day in court, becomes eight days. You make a decision as to Mr. Picinich one way or the other, whatever you decide, that will last a lifetime.

You heard the life expectancy tables. 20.7 years from now, it has been four and a third since the accident, some close to 24 years, 25 years involved in this case in the man's lifetime. You will make that decision.

So Mr. Picinich who probably does have enough language skill, he passed the citizenship test, manages to get

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around the city of New York and respond to longshoring commands and directions at work. So he is to match his command of the language against the command of the language, the skills, the years of training as an advocate and as a questioner of Mr. Leonard and of Mr. Kain. That apparently is the shipowner's and stevedore's idea of a fair match. Enough said for that.

I listened to their summations and I ask you now to throw your minds back to it, to when we started the trial eleven days ago. A few moments ago did you hear one reference by either of the two counsel to stacking devices? I didn't. They have stayed away from stacking devices as if it weren't in the case, as if it didn't exist, when we all know, and I don't want to oversimplify a case, I don't want to insult our presentation of the case or your reception of the case by saying it is all that simple, it is one thing. Very few things are that simple. But certainly this case has as one of its central aspects (indicating) that. And the suggestion that it doesn't exist, that it is some kind of strange animal, do you recall when his Honor, with all of the intense interest which I think is marvelous, he keeps us interested and excited about a case, it is marvelous the way the judge asks questions, inquires about matters and sometimes cuts off

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lawyers when they wander into unnecessary areas. Can't we get some objective evidence, can't we get a picture, an item so the Court and jury can see, he said? And finally it was McGrath, Mr. Leonard's client, who produced the stacking device. They exist right there on the pier. You can see this is not brand new, it's been used. When it comes to the ace there is such an unfamiliarity. What is this strange device, whoever heard of a stacking device? Isn't it interesting with all the resources of these defendants not catalogs, no books, no demonstrations from impartial sources that have nothing to do with this case, presents any pictures, portrayals, standard ways of handling container cargo in the manner that their expert witnesses who are paid fees come on to testify? No such impartial outside evidence in support of their cause as to the strangeness, the nonuse, the frequent nonuse, the general nonuse, in the last few years, and I am talking about '71. I am not talking about 1955 or 1960. Container argo is a development in the maritime industry, as has been pointed out, is moderately young. It doesn't go back to the Phoenician days as ships do. They have existed for years and Captain Ash was able to present cuts from major texts that show it. Where are the cuts from the major texts of stowage, of seamanship? His Honor had to plead to the presentation of a text that would

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have a portrayal and get it from the library upstairs.

Where is their authority for the concept that this is not in the case? We have authorities, Exhibits 5, 6 and 7-A, one cut after another, that we didn't produce or manufacture for the sake of this case. We have the item itself.

There is another little item I want to talk about before I get into other things. You heard Mr. Wheeler, and again it was from Mr. Wheeler alone, come out with the statement that these containers sit on four corners like a table. Well, that was kind of central because he developed an argument and I will come to how important or unimportant it was. But he developed an argument as to how a struck container would respond to being struck, as to whether it was sitting like a table on four legs or casters as against whether it had flat edges all around sitting on whatever it would be sitting on. Assuming, of course, that the stacking devices are not being used, as is the conceded fact in this case.

Take a look at the metal? See the way it goes. Remember, they made much of a point, because I turned it over so we can have the bottom of the one that Mr. Picinich's working surface was sitting on. They said look, this is the model of the bottom corner. I'm not going to pick it up now because it is kind of heavy. You can visualize it, I'm

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sure. This is the surface on which it sat. You see a caster protruding here? This is flush.

Now, someone might say Mr. Friedman is taking advantage. Mr. Friedman doesn't have the rest of it and that is an argument. Mr. Friedman does have the rest of it, because the photograph they produced, Exhibit D, shows a very nice picture of the end, the eight foot end of the container, and you will see that it is a flush surface right along with no protruding casting.

Again, how important it is to the entire case, well, they tried to make it important. But if they think it is that important, then give it a hard look, both the model and their photograph and decide whether, in fact, that was not a flush rim and not four corners with that distribution of weight.

It is easy for Mr. Wheeler to try to say things long after Mr. Ash has left, long after they talk about the skill of the lawyer. I'm no adversary against Mr. Wheeler as to maritime practices and the fine points. I have to go home, think about it and wonder. And then with a hard look, and after he is out of the courthouse and it is too late to resume the questioning, I say, gee whiz, but the evidence, the exhibits remain.

How important is that anyway? You know, accidents

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happen, as we all know, not when proper practices are followed but precisely when there is some deviation. You can't describe and discuss what must have happened in an accident by making a series of assumptions that nothing but proper practices were followed. After all, with some degree of experience in doing things we can safely assume that if nothing but proper practices were followed the accidents wouldn't happen. Something went wrong, or Anton Picinich would not have fallen 35 feet into the water. It wasn't supposed to happen. And we learn, and I have my finger where I marked it on the rope. I thought it was pretty important. Captain Wheeler couldn't move away from that because it is just too obvious. You look at a clock, if you played with a Yo-Yo when you were a kid, you just know that a two ton weight hanging at the end, and this is the end, it is marked, at the length, and it doesn't matter whether it is hanging from wire or string. It is the fact it is hanging, it is going to spin, rotate, move, and there is no telling for sure, at least within the range of a few feet whether it is going to move in this direction or that direction or another direction. And that is why every witness that I heard in this courtroom said there was a scraping, a contact, a hitting, a bumping. Nobody said that the inboard container was plucked free of the bearings,

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of its nestling place without any contact with the outboard container on which Mr. Picinich was standing and working and doing his assigned duties.

If anyone had said it, I think your common sense would tell you that it is just, in effect, an oversight or lack of knowledge on their own part because any kind of reasonable application of common sense would say to you that the likelihood of some contact between the container being lifted, once they -- when I say they I mean the shipowner -- or anybody they employed, and I want you to listen to his Honor's charge as to the responsibility under the maritime law when a man suffers an industrial accident. Mr. Picinich unquestionably suffered an industrial accident. There is no question he went off that place on the second tier container into the water. There was an industrial accident.

Whether the shipowner, whose equipment and facility he fell from, and I will ask you to listen to his Honor's charge with respect to the duty and the obligation of the shipowner, whose work he is doing. Whether he is hired by the stevedore corporation or not, he is doing ship's work. In ancient days ship's crew did all that work. Modern days they have stevedores. They have it delegated, but it is the ship's work. The law of the sea goes back literally to Phoenicia.

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He sues here and seeks his compensation under the maritime law of the breach of warranty of seaworthiness. That doesn't mean that the Concordia Viking was about to sink. What that means, and what we claim here very simply is, that a particular time and place, 1850, July 12, 1975, in the a.m., number five hatch, port side up on the roof of the second tier cargo container, offshore, just right at that location, was that a location in which Mr. Picinich was called upon, was assigned to do work aboard that ship? That's question one. We submit the answer is conclusivel yes.

In fact, the work he was called upon to do, interestingly enough, and it wouldn't matter but it just so happens that it was a voidable work. Why do I say it was avoidable work? Because that risk and hazard of going up on that roof there didn't have to be so. If the ship's crew, which had elected to take off these lashings in advance and turn all these cargo containers adrift so they were not secured in any way when the longshoremen had to come on and do the discharging work. They were supposed to take all these lashings down. Two they overlooked. Is it human? Yes. That doesn't mean it is not an error. It is human to err, but it is error. As a result of that error a longshoreman had to go up on top for the ship's benefit to

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rescue lashing gear that they wanted to keep as part of their ship's equipment? He was literally doing a favor for this shipowner.

Well, they say to that, you would have had to go up anyway to fit the hook in. Not necessarily so. If, as indeed the chief officer testified, they had lashed these containers down as is shown in the cut, the impartial source, not prepared for the purpose of this case in container's two tier, you could get the hooks in from each side. But they elected to do four. Even if you put these two together and if you made it two tiers, if you just left a little room you could have put a ladder against either end and reach all four hooks of each of the second tier containers and nobody would have to go up on that roof.

Oh, it is a little bit of like playing chess or checkers. You have to look ahead. When you put them on the ship, you have to look ahead as to how you are going to take them off the ship. But is that not a fair request of experienced ship operators, to be concerned with the safety of the men in the next port or the foreign port that are going to have to do the discharging work?

Regardless. He is up there pursuant to doing ship's work, benefiting the ship and they know that this inboard container is going to have to be lifted. Now, the

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ship has elected to pack them in, in effect, one against the other, or just about one against the other. And they know that when they have to be discharged they are going to be hanging in this pendulum condition. So that is foreseeable. The different witnesses would call it a scrape and one would call it a hit, another would call it a bump and the fourth would call it a thud. You don't have to be a lawyer, but anybody who has had the experience of asking as few as three or four people to describe some relatively sudden event that all three or four people happened to see, knows that you are going to get a slightly different version, a different choice of vocabulary, and even a different recollection of the significant events to some degree. But call it thud, bump, hit or scrape, everybody said that there was contact.

So contact occurred and contact was predictable given the procedure they elected to follow. Concurrent with the procedure they elected to follow, which you just knew this swinging was going to occur and you couldn't predict it. You didn't know when it swung it was going to hit flush, it was going to hit with the forward corner hitting the forward end, the back corner hitting the back end, that it would be pulled loose in the forward corner and hit the middle; how can you predict those things? Those things happen

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suddenly, unexpectedly, unpredictably. To try to sit back now and saying for seven days this is the only physical possibility, accidents don't happen that way. It is very hard to predict and recreate exactly how an accident happened. You can only deal with the general truth, that contact occurred.

It is, ladies and gentlemen, something, and I don't think it was fair, a fair representation to you to say that the fact that the container that Mr. Picinich was standing on, the roof, as his working place and surface was struck by the neighboring container, came into the case this Tuesday. It is just not so. Why do I say that? Counsel know that this court ruled, and I don't recall whether the ruling occurred on Thursday afternoon or Tuesday morning, but it occurred just prior to us resuming testimony before the jury, this Tuesday morning that is. The Court ruled that the reports of the McGrath Corporation, which we had obtained on pretrial discovery, could be offered in evidence by plaintiff's counsel, and we did so. And you had before you Exhibit 8 and Exhibit 9. Exhibit 9 is specifically dated July 12, 1971, the day of the accident, and comes from the files of McGrath Corporation, which obviously is united in interest in defending this claim against Mr. Picinich. So how can anybody stand before you, and I say it is not very consistent with Mr. Leonard's evaluatio

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of my abilities as a lawyer to think that I am going to overlook in my presentation to you, on behalf of Mr. Picinich, the fact that the statement that one container hit the other is recorded in the records made by the McGrath Corporation, represented by Mr. Leonard, on the day it occurred. It has been sitting in the business records and files for four and a quarter years.

THE COURT: I'm sorry, but you do let your voice down.

MR. FRIEDMAN: Your Honor, I'm sorry. I am closer to the jury and they can hear me but I should realize your Honor wants to hear me, too.

I want to particularly turn to the superintendent's report of accident of McGrath, which his Honor also ruled and permitted us to place in evidence before you. It establishes that the hour of accident was 9:00 a.m. Maybe it was 8:50. I don't stand on those differences, although I notice that the defendants like to think those things are very significant.

It says, and this is the superintendent. This is the supervisory person, a man with presumably some degree of skill and experience in these matters, "Lashings had been removed by ship's crew. However, two wire lashings were partially still secured to uppermost outboard container at number five hatch." In other words, the ship's crew had left

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them behind.

"Employee," and we now know that was Picinich, "climbed on top to remove these. While doing this," and that meaning the removal of the ship's lashings, "While doing this co-workers hooked upsling to hoist adjacent inboard container."

So Mr. Picinich is doing his job. He was told to get up there and rescue those lashings for the ship. The other longshoremen went forward with lifting off what we designated as the number four container. Now Mr. Picinich is up on the roof of number three. He doesn't control the winch, he didn't control that boom, he doesn't control the movement of number four. He is up on the roof of number three doing his assigned job, 35 feet above the water surface, sixteen feet above the steel deck, and hoping to God that the roof he is standing on is a stable surface because that is what he has got to walk on and to work on, or he can go home.

Next, "Under supervision of hatch boss the winch driver took up strain on inboard container causing it to swing and bump into outboard container."

So is there any question about this? You talk about the force. We are no longer concerned now that this is admissible, this document that existed since 1971. We no

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longer have to speculate about passing ships, churning tug boats. We have the report as to what gave the force.

"The bump caused employee to lose his balance and fall overboard."

Because what we know is that this number three was standing there adrift. They concede it. It is not a matter of dispute. They concede that they had prer ased all of the lashings, all of the deck lashings that had held these containers in pla e throughout the course of the ocean voyage. You can take all of the plaintiff's testimony and all of the witnesses pres nted by the plaintiff and hold it on the shelf entirely and just go to the shelf in the closet that represents the proof presented by the defendants. And from that source alone -- that is why I say it is beyond dispute -- it is established and conceded that all of the deck lashings turn buckles, wires, everything, that were holding any of these containers had been prereleased. In fact, since Sunday.

Again, I don't know whether they think -- I don't think it is only a matter of my not being entirely intelligent. I don't think I have to make this point for it to have occurred to you. I heard an argument by one counsel that while they were prereleased on Sunday, so why didn't they all fall down on Sunday? Well, on Sunday were any

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of the containers being lifted and swinging one against the other, or was everything still? Was it not until Monday morning at about sometime after eight in the morning that the booms were spotted and the containers started to get lifted and the bumping, scraping, hitting started?

The explanation as to why an accident didn't happen on Sunday and happened on Monday is plain and simply because there weren't longshoremen standing on the roof until Monday.

Indeed as we learned from this report it happened to be that they left at this particular location these wire lashings, having cleared them all, presumably, and they missed a couple. And so in this particular location Mr. Picinich had to go up to get them and he happened to be there, because I'm sure there was bumping and scraping and hitting elsewhere. There just didn't happen to be a man standing on the roof doing his assigned job.

It wouldn't matter whether his assigned job was something that was strictly stevedoring or had some benefit to the shipowner. It so happens in this case his assigned case was rescuing ship's gear that they left behind. It wouldn't really change it. If part of his assigned job was to get up on the roof, then that was part of his assigned job.

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The superintendent's report of McGrath goes on to say, "Corrective action: all foremen and hatch bosses have been instructed that no cargo operations shall start until all lashings on all deck cargo and vicinity have been removed."

You decide, ladies and gentlemen, but this is how I read it and interpret it, that there was an improper unloading or discharging method being followed; that they should not have lifted off that number four container while there was a man still on the number three container removing, recovering deck lashings.

Hear it again, if you please. "All foremen and hatch bosses have been instructed that no cargo operations shall start until all lashings on all deck cargo in vicinity have been removed."

What was the removal involved in this case? The lashings that had been left attached up on the roof of the number three box that Mr. Picinich had to go up, pursuant to his instructions, to rescue.

What was the procedure that should not have gone forward? They should not have lifted off number four while he was still on number three.

Now, that and that alone right in the McGrath report reflects that they were proceeding by their own admission

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and statement with an unsafe method of discharging at that particular time and place.

Now, I commend you, if you will, to his Honor's charge on whether with respect to Mr. Picinich's right to receive compensation for his industrial accident, under the maritime law of the breach of warranty of seaworthiness. I am not now talking about negligence.

See, Mr. Picinich has two claims, but he doesn't ask to be compensated twice. Here are two different affidavits to the same location. He says, one, under the laws his Honor will tell you about, there was an absolute nondelegable duty to give me a reasonably safe place to work at the place where I was assigned to do work. That was breached. I am entitled to be compensated.

If it came to be breached, in part or in whole, because of some unsafe procedure, condition that was adopted by the stevedores that were hired by the shipowner that may have an effect on their indemnification case that the judge will decide but it doesn't affect his primary obligation or right to be compensated for his injury. You don't even reach the negligence, because, as I say, he is not seeking to be compensated twice. He is seeking to be compensated only once.

So whether there was negligence on the part of a

ship's crew member doesn't have to be reached on this single theory.

Of course, the hard fact is that you can't and shouldn't, I submit, overlook that one of the contributing factors, a cause, and we lawyers call it a proximate cause, meaning a cause, something that had to do with it happening, was the fact that the box that they gave him as his walking and working surface had now been prereleased in terms of all of its lashings while it was nevertheless without any of the stacking devices. I can understand maybe prereleasing those lashings if you are using the stacking devices, and it is fairly plain, it is the general practice, for deck container cargo. All right, maybe it is not the best way to proceed but if you have the stacking devices in place, move the work along by getting the deck lashings out of the way.

It is probably not the best way or the right way, but I can see living with it. But there is a time to drive 30 miles an hour and a time you can drive 60 miles an hour. It is okay to drive 60 up the New York Thruway -- 55 now it is, on an open four-lane highway but you don't drive 55 through a school district. You don't take off these lashings if you haven't used stacking devices; or if you want to remove those deck lashings in advance, then use

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stacking devices; or if you want to run that risk and carry container cargo and save the money by prereleasing the deck lashings even though you don't have the stacking devices and even though it is foreseeable there is going to be bumping and hitting and you leave some deck lashings behind so a man has to go on the roof, then for God's sake, if the man gets hurt, compensate him. That is not too much to ask.

I don't know how much time I have to take to deal with the matter of Mr. Langan. I think as I recall his testimony he said there was a single tier at his location at the number four hatch. I have yet to see any document that spells out just how many containers there were at each deck. I have looked at their cargo plan and it doesn't say. This chief officer's recollection, well, you make your own judgment. You notice how carefully that log entry managed to, like it was walking around potholes, avoided any of the references. I mean it wasn't that he didn't get it just right, a language barrier or what have you. When it erred on the injuries it was to the effect that there were no visible injuries. Visible injuries weren't even that important in this case, although it was interesting that it was the right side of the head and the forehead and the face and the forearm that showed the

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visible injuries right on McGrath's own report as well as St. Mary's Hospital report and that the man was complaining to Dr. Winokur of penetrating right-sided occiput headaches as well as the other complaints.

The log entry is careful to say that the work he was doing was putting the hook into the container and not rescuing the deck lashings because rescuing the deck lashings, you see, is, so to speak, repairing an inadvertence of the ship's crew. But connecting or hooking up the container, well, that might be more stevedoring work. It might not have any effect, when you get to it under the maritime law, but the chief officer is trying to move it into the stevedore's part.

And that the containers hit one another is somehow totally out of the log. Yet this chief officer comes in and starts to tell us without any notes whatsoever he can remember just what angle, thickness, number of dunnage boards were put in for all of these various containers. After all, he would have no better memory of container three and four than for any of the other 76 containers in terms of how they were stored. He said that at the time of the accident he didn't take any particular reference to it because that wasn't the version. How does he remember it now four years and a quarter later, or has he been reviewing matters with

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counsel so that a particular position could be presented.

Mr. Langan gave you his recollection that it was a single tier and he said it took about five minutes for a container to be removed. I think he said that. I did a little arithmetic at my farmer's waking hour today of 4:30 in the morning and I figured it out, 76 containers at five hatches, a broad sweep, and one that was left behind so it is 75. That is fifteen a hatch. Now, you look at the activity sheet and you find that the containers got removed at almost all of the hatches within about 90 minutes. Actually 80 minutes. But on the activity sheet of McGrath it is 90 minutes on the log. Fifteen into 90, six. Six minutes a container. That is on the broad sweep. Maybe there were a few more at one hatch than another. But it is interesting that totally aside from Mr. Langan, you look at their records and you get something that fits right in together.

Something else. You will recall, and it was just an incident and I didn't think it was significant at the time, but Mr. Picinich came to this gang because they were short. It wasn't his regular gang. Indeed as I now recall it it is right on the report of accident of the superintendent that he is an extra man. "Employee is an extra man." It is right on there.

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Now, think of it. He and Morich I think were both extra men. So they got added to the Mike Santoro gang at the number five hatch and it is reasonable to think that possibly there was some delay in starting up with the work at the number five hatch while these extra men came and joined them so they would have enough men to do the work. No such indication that the number four gang was short so they started a little bit earlier. When you figure that it takes five minutes to remove a container, it is more than reasonable there weren't any containers by nine or ten to nine at the number four hatch. Certainly there weren't any more than a single tier if they started with a double tier, which Langan says they did not. And he is six foot tall, so for his line of vision to go, and he is looking at something sixteen to 22 feet, 35 feet away, he is certainly going to clear that and see it.

What he has to say is in direct accord with McGrath's own reports of accident of July, 1971.

If all that was wrong in a case of this significance, of this effort, of these dimensions, with all this graphic evidence by a Mr. Wheeler who was never on the Concordia Viking, don't you think that with a hundred longshoremen working on these five gangs, with hatch bosses, foremen, superintendents and safety men, that McGrath would produce

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one eyewitness, if not necessarily to the fall, but to the conditions aboard ship to contradict Mr. Langan or Mr. Morich or Mr. Picinich? With four years to do so since the accident?

Not one. A professional witness, Mr. Wheeler. I don't attack him. He has a right to make a living that way. But you have a right to say where does the evidence go? A blind lady of justice, fair and impartial to both sides, Mr. Picinich as well as the shipowner company, which way would the scales tip on the evidence presented and marshalled for you, which way do the scales tip?

Consider what they haven't brought in and their resources to bring it in.

Let me turn, if I may, to the damages. Mr. Picinich presents a sensitive claim here. He says, or those who speak a little bit better for him and on his behalf, say that following July, 1971, a significant, substantial change occurred in his life. I am going to come back and discuss that in a minute, but first I want to focus on this question of whether, (a), it is so, and, (b) -- rather (a), is it so. Because he says that is when it happened and that it has been so since. He says those two things.

Of course, we all recognize as a matter of common

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sense that if somebody is in fairly good health there is going to be literally an absence of record before the event that he says marks the change. Fortunately, and all lawyers make strategic mistakes during the course of a trial; some day I will tell you about mine. But now I will talk about Mr. Kain. Mr. Kain brought forth that in 1968 Mr. Picinich had an elbow injury and he had the medical for it. And, boy, I jumped on that. I was happy to have that. Because what was interesting to me and what I thought was relevant is that when you are dealing with, and anticipating as I did, since I am something more than four years old, that at the close of this case defendant's counsel would stand up and say to you, how do we know that he wasn't this sick before this accident, how did we know? It is a favorite argument. That at least you see by definition that argument is available to them, to anybody who has no prior record because he hasn't been sick and, therefore, you can argue how do we know in that blank period he wasn't. But fortunately in 1968, and a little unfortunately for him, for his elbow, he had that injury that kept him out of work three weeks. He was working for McGrath, and it shows again how much they travel. And three different doctors saw him, for whatever reason, a company doctor and maybe somebody else. And nobody reported anything other than some

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mild injury to the elbow. No complai ts of anything else.

1971 he has this accident. He has traumatic injury to his head, shoulders, and I don't think we have to spend a lot of time that a man taking this fall, it is common sense it is likely he has some trauma and soreness and injury to his shoulders is just right in there.

So he is sent to an orthopedist. He doesn't know orthopedists from psychiatrists. He doesn't know you don't tell orthopedists about your head injuries or pains or what you feel. He just knows you tell the doctor how you feel. So he tells the orthopedist, Dr. Matlas, August 4th of 1971, that he has frequent headaches, dizzy spells, very nervous, as well as the shoulder complaints and the body aches. We have fortunately a record, where three weeks after the accident the man is making complaints that is certainly significant to what developed.

In 1968 when he went to physicians for treatment to the injury, no such complaints were recorded. We know very well that if any had been, or if there was the faintest evidence from anybody in the neighborhood who knew him, where he was employed at McGrath, anyone who had any contact with him, if there were any signs this man had a personality disturbance before 1971, that evidence would have been in this court at this trial.

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He gets sent to Dr. Winokur by Dr. Zitani. What is this talk that none of the treating physicians? How did he come to Dr. Winokur? He was sent by Dr. Zitani, the McGrath Company doctor. That is Exhibit 1 in evidence.

It says, "Following is a summary of my neurosurgical consultation of the above patient at this office on August 5, 1971, per your request and the request of A. Zitani, Jr., M.D., Hoboken, New Jersey."

Do you know who the "your" is? That is J.W. McGrath Corporation.

Dr. Winokur reports August 5, 1971, and it is interesting how he confirms the veracity and integrity of Dr. Matlas' examination.

"Almost constant right-sided headache with radiation to the occiput. Dizziness, nervous, inability and difficulty with sleep," as well as the general body aches and neck and low back, hip and shoulders and legs.

So that what record we have is quite clear that in August, '71, the first week of August, '71, within three weeks after this traumatic accident -- do you know what this is like, 35 or so feet? That is a three to four story window. Think of falling off a three or four story building. That is what happened to Anton Picinich. He fell from a three or four story building. That is a heck of a fall.

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He's 49 years old I don't know how his genes and chromosomes are. I don't know how his family brought him up. I'm not a psychiatrist, but this I do know: that until July, 1971, this man compensated, this man coped, he got along, he had joy in his life. He worked hard. Nobody works as a longshoreman without working hard. But he had another life.

From July, 1971, on there was a different picture. You say how do we know it is a different picture? We have these indications from Dr. Matlas and Dr. Winokur that he is complaining of these things, but how do we know that his, his wife's and son-in-law's story is true?

I was interested and picked up the detective agency mention that was made by Dr. Kaplan, who is a very articulate and able medical witness and who, as you recall, spent an hour or more here describing his five to ten minute examination of Mr. Picinich. And he said that the only way we would really know is a detective agency. He said he did recognize and agree that one could have a severe emotional disturbance and have mental health severely affected by the kind of fall this man had. It is one of these things, the stress factor could do it. He finally said that this was just such an event as could do it. And it doesn't require neural science. One can have this kind of disorder and

disturbance with a perfectly normal neural examination, and he agreed. We will assume that a five to ten minute neural examination is complete. We will give him that much. I think we can also agree, and it is no disrespect to him, that you can't conduct a competent psychiatric examination in the same five to ten minutes that you are also conducting a neural examination. So that in effect there was no psychiatric examination by Dr. Kaplan.

But he agreed that this kind of thing can do it. And nothing in this man's findings contradicted that he had it. In other words, the negative neural in no way excluded the emotional disorder and psychiatric disturbance.

Since 1971, says the family, this has been his life, this has been his condition. And what are they describing? You see how hard it is to prove it when we are called upon to prove it. If a man's condition is that he has become alienated, that he has become anxious and depressed and tearful and withdrawn; if these are the manifestations which the physicians then describe as chronic depression reaction, anxiety syndrome, all those words, retention impaired, perceptual disabilities and the various material knowledge they used; but he and the people he knows describe it in these life terms; what is he saying? He is saying I'm in the corner of my house with tears in my house, in the

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den, in the cellar and that is where I am. So who can possibly prove or present evidence as to that? It never happened to any of us, who could explain or describe it to us? Only those members of the immediate family who are at least passing by and within the same house within which he has withdrawn.

So, again, the defendant can have a field day standing up in court saying how do you know it is so? It is only his wife, son-in-law and he that say so. But isn't it fair to say that if it weren't true, if during these four years since July and August of 1971 his life was other than what he described, that he isn't secluded in the cellar, in the den and staying there, and was going to christenings or weddings or the club or to friends or to relatives, that they have ample resources over these past four years to have observed and reported that in this trial? No crime to that. A man makes a personal injury claim, they are entitled to make surveillance. You can use your own judgment considering the issues and dimensions in this case whether they have done so.

The fact remains that here at the close of the case four years after the claim is presented, although they know where he lives, and he has lived in the same place for ten years; they know where he works because he works for

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them, when he reports and when he goes home. They don't have one job, one iota of somebody who stood in the corner, parked the car, God knows what, every other Tuesday, every third Tuesday over eight months? What does it cost? Considér what costs have gone into the presentation of defendant's case. $150 a day to keep him under observation for ten days. For $1500 they could break the case wide open if it weren't true. It is as easy as that.

I am not telling them anything they don't know. They are very experienced counsel and representatives.

Another major fundamental demonstration, independent of what has not been demonstrated by them, at the Court's direction, and so we had to dc it. I'm not saying it was wrong, I am just saying it was a directive. Mr. Picinich went to see Dr. Mortimer Shapiro, also Dr. Kaplan and Dr. Fred Brown, selected by the defendants. And what came forth? We will hold aside Dr. Kaplan. What came forth from Dr. Kaplan was a negative five to ten minute neural examination. You will evaluate for yourself whether there was any psychiatric content to Dr. Kaplan's examination.

We know that Dr. Mortimer Shapiro selected by them but never presented by them, but here again the Court made its ruling that we could put in evidence his records, his report, that the man has a depression syndrome precipitated

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by the accident of July 12, 1971. We learned that that was a fairly fancy word for brought on by, caused by. The accident, I suppose, was proximately a cause of.

Now, Dr. Brown, and this I find fascinating. Dr. Brown obviously spent some considerable time with Mr. Picinich. We don't have these multiple tests done in a five to ten minute period. He is clinical psychologist. As far as we have been able to identify, he was associated with Mt. Sinai Hospital. Dr. Kaplan recognized him as an authority in the field and that you could not say a word against him.

Dr. Brown was so impressed with the severity, with the depth, with the amount of depression of abnormal responses of the illness of Mr. Picinich that he thought that in addition to their being as he specifically says, a depression reaction, schizo type, in other words a psychiatric illness, that possibly this illness is being contributed to by diffuse organic brain pathology. Some of the brain cells were damaged.

Now, this is interesting. They then put in Dr. Abt's examination, clinical psychological examination which also finds that the man has this psychiatric disorder, that he is anxious, tense and considerably depressed, tensions, distortions, rotations, anxiety, depressive reaction moderately

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severe. What is significant and why do they bring him in with Dr. Kaplan to deal with these two? It is really very interesting. Because Dr. Abt did not conclude that the cause, the headwaters of all of these symptoms, this overwhelming effect on Mr. Picinich's life was being contributed to by brain pathology. He ascribed it to the psychiatric aspect.

You know what they thought? I will tell you and you can make your own judgment. They thought that when it comes time for you to make your judgment as to what is the adequate and fair and reasonable amount of compensation for Mr. Picinich and loss of enjoyment of life and his symptomatology, that you would give more if you felt or thought the cause was contributed to by some brain cell damage than if the same result, the same syndrome, the same impact on his life than if it was a psychiatric disorder. So they wanted to take out or dilute the brain cell damage.

I say to you this, in this day of 1975, a differential diagnosis of just what is causing this condition may be of significance or importance to a group of physicians. It is not and has never been asserted by us to be a central aspect of your decision. What concerns you and what you have to evaluate is, what is the impact on his life? How has his life changed? Whether the headwaters of that causation

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include some brain cell damage, in connection with this fall, or is only -- and even I can do it. You have to be so careful because we think unfortunately of psychiatric damage as something less than organic damage. When if you stop and think about it it is so much more terrifying, so much more difficult to treat, so much less responsive to help, so much more incurable and so much more terrifying to the person who has it than any organic damage can be. And that is what Mr. Picinich unquestionably has.

Dr. Brown, Shapiro, Abt, **Zavitsky,** Allen, one after another. The only one who is negative, the five to ten minute examination. And he didn't do a psychiatric examination. He recognizes and concedes that both Drs. Abt and Brown, both of whom found it on tests, over and above what the family reported, are able and capable men.

I will be soon finished, ladies and gentlemen, and I thank the Court for indulging me.

What is involved here? Many years ago William **Saroyan** wrote, a great American playwright of Armenian parentage that lived in California, also an immigrant family background, wrote a marvelous play called The Human Comedy. The Human Comedy, and the word "comedy" was not referable only to jokes or laugh. In fact, The Human Comedy wasn't a comedy. It was a play about the joys

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of human life, of the relationships of family, husband and wife, father and son, grandfather and grandchild, of the same background, who do raise their voices in song together, who do come together in dance and in song and in life and in pleasure. And what that great man pointed out and dealt with is that that is what the human existence is. A pack mule or horse is led from its stall in the morning to its place of labor and in the afternoon goes back to its stall to await being led out the next morning.

A human being, hopefully, gets some satisfaction out of the work he does during the word day. What satisfaction Mr. Picinich as a longshoreman working with his body and doing manual labor gets I don't know, but I hope he gets some. But over and above that satisfaction is the human existence, the relationship of family and friends, the freedom from anxiety and depression. Not just anxiety. We all have some anxiety, we all can be unhappy at times. That is not his case. You have read the psychological reports, you have read the psychiatric diagnoses. This is a sick,unhappy, depressed, crying, destroyed man. He has lost the joys of life, which is what makes the human being different from the animal species.

It is written in the Bible, "Haish B'shem Adenoi." A man is the image of God. This concept pervades

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all religions. It is part of our western civilization. It does not mean necessarily different religions having di nt views and to whether man physically resembles God or God resembles the human form. What the concept which is important to us whether religious or not, is that man has the emotions and the reasoning power that other species do not have. He can enjoy and appreciate. And if you take that away from him you have taken the most valuable thing that defines and describes man. And that is what has happened to Anton Picinich.

A precipitant of the accident of July 12, 1971, signed Dr. Mortimer Shapiro, the neuropsychiatrist they have selected.

How do you evaluate that in money damages? I think the first thing you have the right to consider and should consider is the number of years that are covered by that loss. 24 years, close to 25 years, a quarter of a century --

MR. LEONARD: I have not risen to this whole thing but the tender was 23 years from four years ago. That is what you read into the record.

MR. FRIEDMAN: I think it is 20.7 from the tables of today and four years and a third since.

THE COURT: There is no problem. 24 years from

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the date of the accident. There is no problem.

MR. FRIEDMAN: That is what I thought I was saying, your Honor.

Close to a quarter of a century, a third, roughly, of the human span, and perhaps, and I won't judge which span is more valuable to a person, but certainly a very valuable third, the final third, children, grandchildren, family. These are the years in which he will live through, and if I may say so, he will die out his life and not live out his life. He will sit through those years working out without enjoyment of life.

How does one seek a fair and reasonable compensation for those kinds of injuries, that kind of loss? What money will sufficiently compensate a human being for that loss? We know he was earning some $850 a month at the time in 1971. At that time in 1971 they had a pay scale of about $10,000 a year. We know that things have risen somewhat since. We can start to think in terms of, well, since he is working, and we are not making a claim for that, ladies and gentlemen, his salary would be a good factor, $15,000 a year, maybe $20,000 a year, maybe $10,000 a year to evaluate his loss of the joy and enjoyment of the human existence.

I thought in those terms and I reexamined it. I

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said imagine him standing up there, Mr. Picinich with his ten, fifteen thousand dollars of earning capacity, and the vice president of the shipping company or McGrath Corporation making $75,000 a year and they had both gone over and both suffered the same sequela and one making $75,000 a year no longer went to his golf or tennis club, no went to his cocktails and different things of that nature, while Mr. Picinich had his different but very valuable to him, way of life. Would the man who is making more be entitled to some much more or much higher rate of compensation because he was earning more? I wonder.

There is no way we are taught as lawyers, as judges, counsel,as to the manner of what is a fair value for injuries. We are not taught that in law school. Go there three years but don't learn a word on that. That is the province of jurors applying that common sense, their human responses, their human reactions. All I can do is tender that problem to you with what little guidance I have been able to present in this presentation.

But I suggest to you just two things to take into primary consideration. That it is an injury and effect that will pervade 24 years of Mr. Picinich's human existence. It is the deprivation of the most important thing that life is worth living for and about. And that while it may seem

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like a huge sum of money to multiply 24 years times $15,000, and I'll tell you now that it is $360,000; 24 times $20,000 would be $480,000. But your decision in this case will cover all time in the future. As you understand the litigation one does not come back to review, modify or add. You will decide this case for the 20.7 years that lie ahead of statistical life expectancy as well as the four years that have transpired. Whatever allocation or compensation you award will be the total and final figure, past and future.

Consider the nature, the depth, the intensity and significance for Mr. Picinich and his family, for the damage he has and will sustain. Consider the number of years that it will affect and control their lives and render judgment that you regard fair and appropriate.

Thank you.

THE COURT: Ladies and gentlemen, we will recess now. It is 1:20 and let's be back at 2:30.

(Recess)

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AFTERNOON SESSION

2:15 p.m.

(In open court; jury present.)

THE COURT: Ladies and gentlemen, let me thank you at the outset for the very careful attention you have obviously given to this case during the last 7-1/2 days. I wish at this time to thank each lawyer for his excellent performance on behalf of his client. The lawyers have worked hard. They have a hard job and they have performed in the best professional manner. Furthermore, I appreciate their assistance in carrying out the trial efficiently, which I believe they did as far as the time is concerned.

Now, we come to the final functions which you, the jury, and I as the Court must perform.

I charge you at this point on the law and it is your duty to follow this law as I instruct you even though you may not happen to agree with it. It is your responsibility to follow the rules which I give you. You as the jury are the exclusive finders of the fact. You determine the credibility of witnesses. You resolve any conflicts in the evidence. You decide what inferences can properly be drawn from one fact to prove or disprove some other fact. Ultimately you apply the rules of law I have

given you to the facts as found and determined by you and you arrive at your verdict.

The verdict which you will render in this case will be in the form of answers to certain interrogatories. I will point these questions or interrogatories out to you as I go along in my instructions. And, of course, when you go to the jury room you will have this form with you.

Any verdict you render, any answers to these questions must be the unanimous verdict of each one of the jurors. Your determinations must be based on the evidence as adduced in the court. This evidence consists of the live testimony of witnesses, in one case the deposition testimony of an absent witness, and the evidence, of course, also consists of exhibits admitted into evidence. In a few cases facts have been stipulated and you will have regard to those stipulations.

You have heard the attorneys make their opening statements and just this morning their summations at the conclusion of th evidence. These arguments of the attorneys are designed to help you understand what each party believes has been proved or has not been proved, but the statements of the attorneys are not in and of themselves evidence. If your recollection of the evidence differs from what an attorney has told you, it is your

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recollection which controls.

During the course of my instructions to you I will, to some extent, refer to the evidence, and I may refer to certain contentions of the parties regarding the evidence. In this regard I want to caution you on two points. In the first place, if I refer to a particular item of evidence I am not attempting to single that out as having special importance or as being conclusive. If I mention items of evidence I do so only to illustrate particular points that I wish to illustrate to you. Or if you mention particular contentions I will be doing it to illustrate some particular point. But it is your job in your deliberations to consider all of the evidence and all of the contentions which have been advanced to you by the attorneys stating their various positions.

All of the evidence and all of the contentions are important to this case, and naturally it is not possible in my charge to you to repeat all of the evidence or all of the contentions which you have heard.

Another thing I want to say to you in this regard is that under no circumstances are you to attempt to infer or speculate as to any view of mine as to what your verdict should be. You and I have very separate functions, and just as I know you respect my function in making rulings

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on matters of procedure and law at the trial and instructing now on the rules of law, it is equally true that I respect your function as the finders of the fact. I have no intention whatever of trying to interfere with your performance of that function. Nothing that I have said at the trial and nothing that I say now in my instructions is intended in any way to indicate to you how you should find the facts or what your verdict should be.

It goes without saying that you are to approach your function in an attitude of absolute impartiality and fairness. All the parties before you are equals in this court of law. There is to be no difference in treatment for any reason. You are to pay no attention to the fact that there is an individual here as the plaintiff and that there is a corporation here as the defendant. Both individuals and corporations are equal in this court for purposes of receiving justice.

This case, since it is to be decided on the law and on the evidence, is not to be decided on the basis of any emotion, any feeling for a party or against a party. It is not to be decided by any emtoion in favor of or against any attorney. It is not to be decided on the basis of sympathy. It is only to be decided on the basis of the facts and the law.

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An important part of your responsibility is to assess the credibility of the witnesses. I mentioned at the beginning of the trial certain factors to be taken into account in doing this. They are really common sense factors. Although we don't realize it consciously at all times, in our every day life we are frequently met with the need to asses the credibility of people who are telling us things. How do we do it? Well, you do it in the courtroom basically the way you do it in every day life, although it is in a different setting.

First of all, you look at the witnesses. You judge their demeanor. Does the witness appear to be straightforward and candid or does he appear to be something else? And then we all realize that appearances can be deceptive, so we go beyond appearances. We take into account the appearances but we also take into account other things. We consider how probable or improbable the story is that is being told us in the light of common experience and any other factors.

Alsc in a trial one of the things you will consider is how one witness' testimony jibes or doesn't jibe with the other evidence brought out in the case.

Aside from questions of honesty or dishonesty, there is the question of the accuracy of somebody's memory

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or the accuracy of his observations,because people can be trying in the best way they can to tell the truth but sometimes their memories are faulty or sometimes their opportunity for observation was not all that good.

So these are factors to consider.

Another factor to consider is whether any witness has indicated any bias or whether he has such an interest in the case that his testimony is colored. Obviously the plaintiff has an interest in the outcome of the case and his family has an interest in the outcome and this is a factor to be considered.

Obviously also a former employee of the defendant has some interest in the case in a way. The point I am trying to make is these are factors which youare obliged to consider.

But at the same time it is also true that just because the plaintiff or because a former employee of a defendant has an interest in the case or a possible interest, i t doesn't mean that they cannot testify truthfully and accurately. It is something that you will have to weigh and determine.

Another factor to be considered in an appropriate situation is whether a witness has made inconsistent statements. Sometimes a witness will in the course of a

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trial say one thing at one time and change his testimony to say another thing at a later time. Sometimes what he says at the trial is different from what he may have said on another occasion. For instance, on a deposition or in a statement of some kind.

Now, these are factors to be considered by you in determining the truth of what the witness is saying in court.

Sometimes an inconsistency is so trivial or so obviously explainable in a normal way that it is of no consequence. However, sometimes it goes to the very heart of the person's testimony. So it is a matter of weighing with a balanced view this question of inconsistencies, if you find there were any.

Now I am going to discuss with you the important question of burden of proof. You have heard about that to some extent from the lawyers. In the remaining part of my instructions I will make some reference occasionally to the matter of burden of proof.

On each basic claim in the case somebody has the burden of proof. On the plaintiff's claims against the shipowner for alleged unseaworthiness and for negligence and on the plaintiff's claim to be entitled to damages, on both these points the plaintiff has the burden of proof.

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In connection with a claim by the defense that the plaintiff was contributorily negligent, the defense has the burden of proof.

What does burden of proof mean? In a civil action the party who has the burden of proof must prove to the jury his case by what we call a fair preponderance of the evidence. In my discussion at this point I will just use for purposes of illustration the plaintiff's claim against the shipowner so I can talk about something concrete. What does the word preponderance mean? It is the most important word in this definition and it simply means weight; that is, if you weigh or mentally evaluate or weigh the evidence on both sides of the issue, all the evidence, the plaintiff on his claim must convince you that the weight of the evidence, the preponderance, tips in his favor.

Now, we are not talking about the number of witnesses, we are not talking about the quantity of proof or the number of hours taken by any party. We are talking about the convincing quality of the evidence. An illustration may help to understand what we are talking about. Perhaps you have seen in old fashioned drug stores these apothecary scales. There is a pan on one side of the scale and a pan on the other side. Let us take the plaintiff's claim and try to visualize it with this kind of a metaphor.

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If you put the evidence for the plaintiff on one side of the scale and the evidence for the defendant on the other side of the scale, if the evidence for the plaintiff tips the scale in his favor, then obviously the plaintiff has sustained his burden of proof.

This is true even if the plaintiff tips the scale only slightly. He doesn't have to have a perfect case. He doesn't have to prove his case beyond a reasonable doubt. He just has to prove his case by a fair preponderance of the evidence. He has to tip that scale slightly in his favor.

Now, let us suppose on the other hand that after evaluating all the eivdnece you believe that the scale tips in the defendant's favor. Obviously the plaintiff loses. He has not sustained the burden of proof.

I suppose the situation where this burden of proof rule becomes most telling is in the situation where the jury feels that the scales are evenly in balance, where the positives and the negatives, where the assurances and doubts are even. Suppose in a hypothetical case you had one witness testifying one way and another witness testifying in the opposite way and there was no means by which you as a jury could determine which one was corroborated, which one was more or less credible. So the scales were in

balance. You had no way to resolve your doubts, just had one word against the other and nothing more. In that case you might feel that the things were even. And if you did, the plaintiff would lose because he had the burden of proof. If you just have doubts you can't resolve, the plaintiff loses if he has the burden of proof.

Now, let us go to the specific claims in the action, the claims of the plaintiff. And you have heard from the attorneys, the plaintiff seeks recovery of damages on two different legal theories. The theory of unseaworthiness and the theory of negligence.

Now, in some cases the problems and the issues on these two theories are really quite different. In this case as the proof has shaped up and as the arguments of counsel have evolved, as we have heard them this morning, it seems to me that although we are dealing with two separate legal theories, the evidence about these two theories and the problems about them are virtually identical. In my own mind I can't particularly distinguish. But I am going to charge you on both theories. I am going to tell you the rules of law, but I do so in the hope that it won't confuse you into thinking that these are two different cases. I don't believe they are in this case, and I believe the evidence and the problems are essentially

the same in this case, although it might be different in another case.

I say this because when people present things that are supposed to be different to me but are in reality the same I can get confused and I hope you will avoid any confusion on this score.

Now, let us deal with the claim that has received the most argument today in the presentation to you and that is the claim of unseaworthiness. Now, here the plaintiff seeks recovery of damages from the owner of the Concordia Viking, a Norwegian company called Skibs A/S Samuel Bakke. This claim of plaintiff is under an ancient law of the sea known as the warranty of seaworthiness. This imposes upon the owner of a vessel the duty to supply to crew members a seaworthy vessel, that is, one reasonably fit for its intended purpose or use; or, stating it another way, a ship reasonably adequate and fit for crew members to perform their functions on.

The shipowner's duty to supply a seaworthy vessel extends to all areas of the ship, to hatches, decks and all working areas used by the crew in the discharge of their duties. The duty is a continuing one and it is not delegable; that is, it cannot be passed on to some other party.

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Relinquishment of control of the vessel or part of the vessel to an independent stevedoring company does not relieve the shipowner of its absolute duty to supply a seaworthy vessel.

Mr. Picinich, as you know, was not a regular crew member. He was a longshoreman employed by J.W. McGrath Corporation, which had been engaged by the shipowner to load the vessel. Since the plaintiff, Mr. Picinich, was servicing the ship's cargo he, too, is entitled to the benefit of the warranty of a seaworthy vessel just as if he were a regular crew member. The shipowners duty to provide a seaworthy vessel to the plaintiff is entirely independent of whatever duty plaintiff's employer, the stevedoring company, may have owed to the plaintiff.

As I said, the shipowner's duty to supply a seaworthy vessel is absolute and if the shipowner fails in this duty and as a proximate result a crew member or longshoreman servicing the ship's cargo is injured, then the shipowner is liable for the resulting damages. This absolute liability is imposed even though the shipowner may have been free from fault, and even though none of the employees or anyone in charge of the ship knew of defective or unseaworthy condition.

Liability for an unseaworthy condition does not

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in any way depend upon negligence, fault or blame.

For instance, if you had a latent defect in a piece of steel and the steel girder collapsed while someone was walking on it in the course of their business, it would be an unseaworthy condition, if there was a defect and if the steel wasn't safe to walk on no matter whether it was completely hidden or not.

So the theory of unseaworthiness is the theory of an unsafe condition not personal fault on anyone's part.

The most helpful way to say this is that unseaworthiness is really a physical condition and how that condition came into being and whose fault it might have been is really irrelevant as long as the jury finds that there is a physical condition which comes within the rules of unseaworthiness.

I must say, on the other hand, that the existence of this duty of seaworthiness does not imply or mean that the shipowner was required to furnish a perfect or an accident free ship. The shipowner is not required to supply the best possible ship or the best possible gear that could be supplied for the particular purpose.

The key word, and what I have been discussing with you, is reasonable. And all that must be done is to provide a ship which is reasonably fit for its intended

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use, reasonably safe for the men, including the longshoremen, to carry out their duties on. Even though there may be better, safer and more modern equipment available.

In this regard I should state to you what is obvious, that there are some risks which are inevitable and inherent in working on shipboard. The shipowner is not required to take steps to protect against every conceivable danger or, as I said, to make an accident-free ship.

The warranty of seaworthiness applies even while a vessel is in port, it applies to the condition of the cargo when loaded on the ship. If the condition of the cargo when the cargo is on board the ship is unsafe for longshoremen to work in reasonable safety, then this is an unseaworthy condition. This is true even though the condition is created by persons other than the ship's officers or crew, even though the condition is created by employees of a stevedoring company.

In other words, to repeat, it is the existence of the unsafe physical condition that constitutes unseaworthiness, if you find that such an unsafe condition existed.

The owner's duty with respect to stowage of cargo is that the stowage be fit for its reasonably intended purpose, that the stowage will be reasonably safe and convenient both for carriage at sea and unloading at the

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port of destination.

In order to hold the defendant liable on the unseaworthiness claim you must not only find that the unseaworthy condition existed but you must also find that such condition was a proximate cause of the injuries sustained by plaintiff.

Proximate refers to an unbroken chain of events flowing from the unseaworthy condition and leading to the injury complained of. If the chain of events flowing from an unseaworthy condition is broken by some intervening act which caused the injury, then the factor of proximate cause between the unseaworthy condition and the jury is not established. In other words, there must be this causal relationship between the alleged unseaworthiness and the jury. It is also obvious to you, I am sure, that there may be several causes of an event and all that is required is that the unseaworthiness be one of the proximate causes of the injury.

I should caution you that an isolated momentary act does not constitute unseaworthiness. Thus in this case if the winch operator by the way he momentarily handled the controls caused a container to bump the container where plaintiff was standing, this momentary handling and bumping would not be unseaworthiness.

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As you know, plaintiff's claims of unseaworthiness relate to conditions other than the momentary handling of the winch and the bumping -- conditions which are claimed to have existed for some period of time, such as the alleged insecure condition of the containers after the lashings were loose or removed on Sunday, July 11th, and the presence of the one or two loose lashings on the container where plaintiff fell from.

The basic contention is that these conditions were unreasonably unsafe and that they were one cause that they permitted another event such as the bumping to result in the injury.

But the thing I want to point out now is that if you find that plaintiff's accident was caused solely by the handling of the controls by the winch operator and the bumping without any of the alleged conditions of unseaworthiness, then the shipowner is not liable under the claim of unseaworthiness.

Also I should say here that if you find that the accident was caused solely by some act or neglect of plaintiff without any of the alleged conditions of unseaworthiness, then, again, the shipowner is not liable under the claim of unseaworthiness.

Going back to basics, if you find, under the rules

which I am giving you now a[illegible]will continue to try to explain, that there was an unseaworthy condition in connection with the arrangement of the containers, the lashing of the containers, the securing of the containers or loose lashings on top of the containers, if you find that one of those conditions or all of them were an unseaworthy condition and if you find that such condition was one of the proximate causes or direct causes of plaintiff's injury, then and only then would there be liability on the claim of unseaworthiness.

Now, let me state that the mere fact that plaintiff met with an accident and was injured does not in and of itself establish unseaworthiness or entitle the plaintiff to recover. The defendant shipowner is not an insurer or an absolute guarantor of the plaintiff's safety under all circumstances.

What I have toldyou thus far is somewhat abstract. I have given you more or less general principles which you must apply to the specific claims in this case. I will not attempt in this charge to summarize for you all of the contentions of the plaintiff or all of the contentions of the defense on any phase of the case. This has been a relatively short case and you have just this morning heard able statements by each lawyer as to what each side con-

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tends. They can state their contentions better than I can, and it is their job.

What I wish to do now is merely to illustrate certain specific isolated points with the hope that this may help you in approaching your deliberations on all the issues. You have heard a great deal of evidence and discussion as to whether the container on which the plaintiff stood at the time of his accident moved or didnot move. As you know, plaintiff contends that the container did move and that one of the causes of such movement was an alleged unseaworthy condition in failing to have stacking plates or lashings in place to prevent such horizontal movement.

You have further heard a great deal of evidence and discussion on the question of what force did or could have caused the alleged movement.

I wish to state to you that it is not necessary as a matter of law that plaintiff prove to you exactly what force caused the container to move if you believe it moved.

Whatplaintiff must prove to you, if he is to succeed on this particular issue in the case, is that there was an unseaworthy condition which existed and which permitted some force, even though an unknown force, to move the container.

This raises a distinction which I think you should

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keep carefully in mind on this point. Although plaintiff need not prove the exact force that caused movement, as long as he proves that movement resulted in part from an unreasonably insecure and unseaworthy condition; still you must consider the evidence about what caused the movement for still another purpose.

Defendant contends that there is no sufficient proof that the container moved. You must, of course consider all the evidence relating to the basic question of whether ornot the container did or did not move. You have the specific evidence about the bumping which you are to evaluate as to its reliability.

Moreover, you have the evidence, pro and con, about whether there could be forces sufficient to move this two-ton container in the condition it was resting at the time of the accident. This evidence about whether or not there was sufficient force in play tomove the container must be considered by you as circumstantial evidence on the question of whether the container did or did not move.

In other words, if you believe that there were sufficient forces in play to move the container, you will consider this as some evidence of plaintiff's contention that the container did in fact move.

If on the other hand, you believe that there were

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not sufficient forces -- I will start that over.

If on the other hand, you believe that there were not sufficient forces in play to move the container, you will consider this as some evidence against plaintiff's contention that the container moved.

This may sound involved but I think this is the way the parties have really approached the question, and lest there be any confusion in your minds, I wanted to make it clear how you should or should not use this particular line of proof.

I wish now to discuss with you plaintiff's contention that it was an unseaworthy condition to loosen the lashings without having stacking plates installed. Of course, if plaintiff has failed to prove any movement which would have been prevented by lashings or stacking plates, then this is the end of plaintiff's claim on this point. The matter of lashings and stacking plates would simply be irrelevant if there was no movement.

But if you find thatplaintiff has proved that the container on which he was standing did in fact move and that such movement would have been prevented by different lashings or stackingplates, then you still must consider whether plaintiff has proved that the absence of lashings and stacking plates at the time in question was an unseaworthy condition.

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How do you, as a jury of laymen, make a determination on this point? You are not in the shipping business, of course. In the first place, as I have instructed you, plaintiff must convince you by a fair preponderance of the evidence that the shipowner should have used stacking plates or different lashings at the time in question. If the matter is left in doubt in your minds and if the plaintiff has failed to thus convince you, plaintiff loses on this issue in the case. But if the plaintiff has convinced you of his claim in this regard by a fair preponderance of the evidence, then he prevails on this issue.

Let me describe some specific considerations. On the question of whether the outboard container where plaintiff was standing should have still been lashed at the time of the accident, you have heard the testimony of Captain Ash on direct examination to the effect that the ship's crew should have waited until the container was ready to be raised before knocking off the lashings. You have heard the cross examination of Captain Ash where he was asked whether stevedoring practices and union contracts would not prevent the ship's crew and the longshoremen from working together in this fashion.

You have further heard the testimony of Captain Ash on redirect examination to the effect that crews called

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lashing crews of longshoremen could work with the other longshoremen in knocking off the lashings immediately prior to the container being raised. Then you have heard the testimony of Captain Wheeler for the defense, stating that lashing crews do no such work. This is part of the evidence which you should consider in determining whether it was unreasonable under all the circumstances for the lashings to be removed by the ship's crew on Sunday before the longshoremen commenced their work on Monday.

The contention of plaintiff, of course, as outlined by Mr. Friedman this morning, is that it was an unseaworthy condition to have the lashings taken down without having stacking plates in place to prevent horizontal movement. What are you considerations, or some of them, in determining whether it was an unreasonably dangerous condition not to have stacking plates? As I have instructed you or indicated already, you cannot hold defendant liable for unseaworthiness as to the stacking plate problem simply because you believe that stacking plates were better or a more modern device than what was used by defendant. It is condeded that, in general, there is more than one safe and proper way to stow containers on the deck of a ship. Your inquiry is whether the method of stowage here, the devices which were used in the absence of stacking plates, falls below a standard of

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reasonably safe under all the circumstances.

You are entitled to consider whether when a ship is lying tied to a pier in calm water it is reasonable to trust in the weight of the containers and the weight of the top tier of containers placed on dunnage, if you believe dunnage was in place, to keep the containers from horizontal movement under reasonably foreseeable circumstances.

In other words, the shipowner need not guard against every conceivable hazard but only those which are reasonably foreseeable. On the other hand, if you believe that the shipowner should foresee that these containers would be insecure and unstable in the normal conditions of the ship at the pier during discharge, considering the motions that are to be expected and considering what is likely to happen in the movement of containers in the discharge, then it would be unseaworthy not to have some devices such as stacking plates in place in addition to relying on the normal forces of friction and dunnage.

In other words, if you believe that the shipowner should have foreseen that under normal circumstances those containers wouldbe insecure at the pier under the conditions we had here, in the absence of stacking devices, then it would be unseaworthy not to have them.

Let me speak for a moment also about the contention

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of plaintiff that there was an unseaworthy condition by virtue of the one or two loose lashings left on the top of the outboard container while the stevedoring work was going on. The question here is whether there was a normal condition even though not perfect, but normal considering the nature of the work performed and whether it would be normal to expect the longshoremen to clean up and remove the few loose lashings by the ship's crew; or, on the other hand, whether the condition was unreasonably unsafe under the circumstances and a condition which plaintiff should not have had to cope with in his work in the normal course.

Let us now consider plaintiff's alternative and second claim, the theory that the defendant shipowner was negligent. You must consider and make a separate determination as to this claim no matter how you decide the unseaworthiness claim.

The second or alternative claim invokes another concept of law.

I will read the question which you are to answer with regard to unseaworthiness, and that is question No. 1 on the special interrogatory form.

"Do you find there was an unseaworthy condition on the Concordia Viking which was a proximate cause of plaintiff's injury?"

You either check it yes or no.

Now, going on with the next claim, plaintiff as an employee of the McGrath Company which had been engaged by the defendant shipowner to discharge its vessel obviously had to enter upon the vessel in order to do his job. Accordingly, the defendant ship owner, entirely apart from its duty to supply a seaworthy vessel, also owed to plaintiff and his fellow longshoremen the duty to exercise reasonable care to provide them with a reasonably safe place to work.

Plaintiff's contention here is that defendant shipowner breached that duty and that the defendant was negligent. Negligence is the failure to use ordinary and reasonable care under the circumstances. Negligence is doing that which a reasonably prudent person would not have done or failing to do that which a reasonably prudent person would have done under all the circumstances of a given situation.

If the defendant shipowner was negligent and if such negligence was one proximate cause of plaintiff's injury, then the defendant shipowner would be liable for damages.

Plaintiff has the burden of proof on this claim. To succeed he must establish by a fair preponderance of the

evidence that the defendant was negligent and that such negligence was one proximate cuase of his injury.

You will recall under the claim for unseaworthiness it did not matter, strictly speaking, whether the ship's personnel knew or did not know of the alleged dangerous condition. If in fact a condition of unseaworthiness existed which was a proximate cause of the accident, there was sufficient to make the defendant liable.

The rule under the negligence claim is somewhat different. The defendant cannot be liable on this claim unless it knew or in the exercise of due care should have known of the alleged unsafe condition.

Plaintoff on his negligence claim contends first that the condition of the lashings and containers was unreasonable and improper and unsafe for normal work. This is the same basic contention as in his unseaworthiness claim. In his negligence claim he also contends secondly that the ship's officers and crewknew of and were responsible for creating these improper and unsafe conditions.

So your basic inquiry in both the unseaworthiness claim and the negligence claim is whether there were conditions which, under all the circumstances, in consideration of the various matters which I posed to you earlier, whether there were unreasonably insecure and unsafe conditions.

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And in the negligence claim the added element which you must find to sustain it is that the ship's officers and crew knew of or were responsible for those conditions.

Now, one thing I should caution you about again on the negligence claim. That is similar to what I alluded to earlier on the unseaworthiness claim, that is, that the shipowner is not liable for any fault or neglect on the part of a winch operator employed by the stevedoring company in the momentary handling of the winch and the container held by the boom at that moment.

The second question on the form is "Do you find there was negligence on the part of the shipowner which was a proximate cause of the plaintiff's injury?" You are to check yes or no..

Obviously by instructing you on the law of damages I am not implying that you should find the defendant is liable, but if you should find that the defendant is laible you must be prepared to go into the question of damages. For this reason I now instruct you on this subject. The first instruction is that plaintiff has the burden of proof on the issue of damages.

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RDP

The purpose of the law is to award as far as possible just and fair compensation for any loss which directly re-resulted from the accident in question if you find the ship owner to be liable.

Damages must be purely compensatory and reasonable. They are not intended to punish or to penalize a defendant.

When we say "compensatory" we are talking about something intended to make the plaintiff whole. When we are talking about punishment or penalty, which you are not to award, we are talking about some punishment you are imposing on a defendant, but that applies in a different kind of case. That concept does not apply here.

Only compensatory damages areawarded in a cases like this.

In assessing damages, you should take care that they are neither inadequate nor excessive. I am sure you feel that is about the most obvious statement that has been made in years, but it is worth saying and keeping in mind, because the point is that you must avoid extremes.

The matter rests in your sound discretion, and you will be guided by your common sense and your experience.

Now, what about the elements of damage?

There are two basic elements sought to be recovered here:

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RDP 2

First, a claim for loss of past earnings. The plaintiff claims that as a result of this accident he was necessarily out of work for ten months, from July 1971 to about March or April of the next year. You will recall his evidence that he returned to work after three months for about a day but felt he could not continue, and he remained out of work for another seven months.

It has been stipulated, I believe, that at the time he was employed he was earning currently about $850 per month.

Now, I should instruct you that there is a duty to mitigate any claim for damages, and there would be a duty to work as soon as the plaintiff could reasonably work in order to avoid building up lost earnings, and you are entitled to consider whether or not you believe the plaintiff could reasonably have been expected to work earlier than the time he did.

I think I have indicated to you, or the lawyers have indicated to you, there is no claim for any loss of earnings past the ten months that occurred immediately after the accident.

The major claim here is for suffering, for mental impairment, for loss of enjoyment of family and home and deprivation of recreational activities. You have heard

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extensive proof and argument on those subjects, and I think it would be completely redundant to try to summarize or repeat that. I simply charge you that if plaintiff has proved that these conditions or any of them resulted from the accident of July 12, 1971, and if you find that the defendant is liable for that accident, then these are all kinds of injury for which the law does allow monetary compensation.

The law allows compensation for these elements of damage both in the past, up to the present time and with respect to the future for a period as long as you believe that they will last.

You are entitled to consider, but you are not bound by the figure which has been stipulated that the plaintiff had a life expectancy at the time of the accident in 1971 of about twenty-four years.

Now, no one has testified and no one could testify in any case as to any mathematical way to calculate a monetary damage figure to be placed upon elements such as depression, mental impairment, loss of enjoyment in home life and recreational activities et cetera. The plaintiff's burden of proof in no way requires the plaintiff to put on any such testimony. There really could be no such testimony. This is a subject, that is, attempting to put a dollar figure on elements such as this, this is a subject which

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would obviously cause a jury in approaching it some difficulty, but the only guide I can give you is that it is up to you to use your good judgment and your good common sense and sense of fairness in attempting to determine what monetary figure approximates the type of injury and degree of injury which you find has been proved both in the past and in the future.

The courts have found, through long experience, that although no mathematical calculation is possible for this type of injury, juries through the use of common sense and their sense of fairness, regard for both parties, are able to come up with fair monetary figures on these elements of damages.

With respect to any figures mentioned to you by plaintiff's attorney, it is certainly fair argument for plaintiff's attorney to suggest figures to you. That is his job. On the other hand, like all statements of the attorneys, that is not evidence, and you may accept or reject any suggestion to you by an attorney with regard to the specific figures. It is merely to be treated by you as argument, and you can give it the weight that you think it should have. But your basic job is to start from the evidence and determine what you believe would be a fair monetary equivalent for this type of damage, if you reach that question at all.

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I further instruct you that in connection with the problem of depression, mental suffering and so forth, the plaintiff had a duty to take reasonable steps to mitigate these damages of this nature. He had a duty to take reasonable steps to obtain treatment.

On this point, the defendant has the burden of proof in showing an unreasonable failure to obtain treatment. On this question, you are entitled to consider the expert evidence. You have heard evidence from, I believe it was, Dr. Kaplan, that in such a situation as this, treatment either by psychotherapy or medicines could be expected to have had a beneficial effect.

You have also heard the report of Dr. Brown, I believe, to the effect that there would be certain impediments to fruitful treatment in respect to a patient of this kind because of language barriers, suspicion and so forth. You are entitled to take into account these expert views and weigh them and evaluate them.

You are also entitled to take into account your own good judgment and common sense on the question of whether plaintiff should have sought treatment.

If you believe that plaintiff should have sought some treatment or attempted some treatment and did not do so, then how do you deazl with the monetary effect of that on the

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damage award? Again, there is no way to mathematically calculate that question any more than there is a way to mathematically calculate the basic question of how much damages the plaintiff has suffered.

If you find that the defendant has shown that the plaintiff should have sought treatment and did not do so, you may, depending on what you believe has been shown to your satisfaction and to your common sense, reduce the damage award by a small amount or not at all, depending on what you feel you are convinced of.

The net of it is you may reduce the damage award to such extent as you believe in your own sense of fairness and good common sense it should be reduced, and whether that is a great amount or none at all is up to you to determine.

Returning to the question of witnesses, you have heard what has been termed expert testimony from various sources. You have heard expert witnesses, opinion witnesses in court, and you have had introduced into evidence for your consideration the opinions and the reports of various doctors who were not before you as witnesses but whose reports were introduced.

It is proper in any litigation to introduce the opinions of persons who are thought to have special expertise in a field, whether it is the field of shipping or longshoring

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or medicine or psychiatry or whatever, and the jury should consider carefully those opinions. But the jury is not bound by any opinion, and in a case such as this one, where opinions conflict, the jury must resolve those conflicts.

The jury is interested in considering two basic questions in evaluating an expert's opinion:

First of all, the jury must evaluate the underlying facts on which the opinion is expressed. Does the jury believe that the factual basis for that opinion has been proved or has not been proved?

Secondly, the jury is entitled to and will necessarily evaluate the strength and validity of the opinions given. Just because you are laymen and you have before you people who purport to have expertise does not relieve you of the responsibility to weigh their opinions and evaluate them in the light of your good judgment.

Let me now come to the question of what we call contributory negligence. That is the question of whether the plaintiff himself contributed to the accident and, if so, to what extent.

The plaintiff was under a duty to exercise reasonable care for his own safety. He was under a duty to act in such a way for his own safety as you would expect a reasonably prudent longshoreman to act under similar conditions.

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On this issue of contributory negligence, the burden of proof is on the defendant ship owner to sustain the claim of contributory negligence by a fair preponderance of the evidence. However, even if you find that the contributory negligence claim is sustained by the defendant, this is not automatically a complete defense to the plaintiff's claim. Should you find that the defendant has proved that the accident was contributed to in part by plaintiff's own negligence, then there must be a proportionate reduction in the amount of damages awarded to the plaintiff.

Only if you find that the plaintiff's own negligence was the sole cause would there be a complete defense.

I should state to you at this point that the evidence indicates that the plaintiff was required in the course of his employment to go on to the outboard container and unloose the one or two loops -- I am sorry -- to remove the one or two loose lashings which remained there.

The mere fact that the plaintiff went to that spot, even though that was a dangerous move, would not in and of itself be contributory negligence. The only valid claim of contributory negligence here would be if the plaintiff undertook that required task in some manner or by some means or at some time which he was not required to do and was unreasonably risky with respect to his own safety.

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For instance, if you find that the plaintiff could have and should have stepped to another container and waited for the movement of this one container that was being lifted, if you find that that happened, that the plaintiff could and should have moved in another way than he did, then in that kind of circumstance, and only in such circumstance, if you find that it is proved, would there be contributory negligence.

Now, the two questions about contributory negligence are as follows:

Question 4: Do you find there was contributory negligence on the part of plaintiff which was a proximate cause of his injury?

The answer is yes or no.

Then Question 5, the last question: If your answer to Question 4 is yes, by what proportion do you find that such contributory negligence was a proximate cause of plaintiff's injury?

Under our law, if you find contributory negligence, unless you find it was the sole cause, you have the duty to apportion it, determine what portion was plaintiff's responsibility and put in a percentage.

Now, that about concludes the charge, which means that you are ready to enter into your deliberations, and I remind you that any verdict, any answer to any of these

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questions must be the unanimous decision of each one of you. Each one must agree in good conscience to a verdict.

You will go into the jury room and you will deliberate, and you will consider all the evidence. The democratic process is for you to exchange your views, raise your questions with one another and do your very best to resolve those questions and agree on a verdyct which can conscientiously be entered into by each one of you.

You will rely upon your recollections of the evidence. To the extent that you do reach a point where you need to have knowledge of a certain point in the evidence and none of you can recall it, it is possible to have the record read back to you. However, this interferes with your deliberations, and it is a very good idea to try to trade recollections before you ask for it to be read or ask for anything to be read, because it takes time to get the portion of the reporters notes, isolate parts of the transcript and so forth.

Sometimes when one person does not remember something, others do. So please trade recollections.

Juror Number 1 will be your foreman, unless he declines to serve, and then you will elect another foreman.

There is one point that I should have told you. If you reach the question of damages, you should be reminded

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that you are not to consider in any way or make any increase because of income taxes. A damage award is not taxable.

Now, when you have reached a verdict and when you have filled out this form, please send a note to me by means of the marshal, who will be at your door. Please do not send the verdict form out. We will convene again when you are ready, and your foreman will announce your verdict in open court.

With respect to any notes or any requests of any kind which you want to address to the Court, do it by a note handed to the marshal, who will be in attendance at the door of the jury room.

It is now about ten of four. I need to have a few moments to see if any of the lawyers have any corrections or other changes which should be made in the charge. I will ask you to hold your places until we conclude that. That will be just a few minutes.

I will at that point dismiss the alternates, with our thanks.

I want to tell you, lest I forget, that since we are somewhat past the midpoint of the afternoon, we are in your hands as to how long and how you want to conduct your deliberations. I suggest you take it one step at a time. See how much you accomplish by a reasonable time, and we can

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consult together about what to do regarding dinner, staying this evening or whatever we have to decide about your scheduling. But basically we are at your service from now on to see that things are as comfortable and as convenient for you as possible.

I want to see the lawyers for just a moment.

(In the robing room:)

THE COURT: Mr. Friedman?

MR. FRIEDMAN: I respectfully except to the Court's statement to the jury that the same facts essentially affect and control the unseaworthiness claim and the negligence claim.

I respectfully except from the Court's statement that unseaworthiness is limited to a condition, unless -- and I request that the Court charge the jury if they find the hatch boss should not have gone forwardwith the lift-off while the man, Picinich, was aloft, because of the likelihood of causing -- bumping and causing the fall, that that can be found to be an unsafe condition that constitutes unseaworthiness.

That was completely omitted from the various items of the claims, which were gone into at some detail, and I except to that.

THE COURT: I will not give that charge.

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MR. FRIEDMAN: I will state my position very carefully, because this case is going to the 17th floor, because this charge was not consistent with the maritime law as I know it.

I will not stand on one foot, and I want the record to reflect that I am being pressured.

THE COURT: Go ahead, please.

MR. FRIEDMAN: I respectfully except from the Court's failure to charge the standard charge that unseaworthiness can exist even if a condition is brief, particularly since the Court has charged about the momentary aspect. It should be made clear it can be transitory unseaworthiness, and it does not have to be a permanent or protracted condition.

I respectfully except from the Court's charge that if the jury finds that the container Picinich was standing on moved for lack of the restraining or stacking device, that they would still have to go on to find that the failure to use the stacking device constituted some kind of unreasonable failure. If they find that the cause of his fall was the movement of the working or walking surface, then that constitutes liability under the numerous cases given to your Honor, unless if they found that the cause was the momentary act of the winch operator.

If that was not the cause and it moved, was not the

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sole cause and it moved, then there is no going into reasonableness in the failure to use the stacking devices.

Your Honor has termed it unseaworthiness, and I don't have the time at four o'clock in the afternoon -- you have permeated the unseaworthiness claim with reasonableness language that violates the DeLima case in this Circuit.

Your Honor did not charge, and I take exception, with respect to the failure to tell the jury that there can be constructive notice with regard to the negligence claim. You spoke only in terms of the ship owner's personnel knowing.

THE COURT: I said "knew or should have known".

MR. FRIEDMAN: The fact that the lashings as used when normal is not the issue, and I except to the Court's charge in that respect. Normal or not, your Honor ignores the language in the decision of Rodriguez vs. Coastal Oil that there is absolute liability if there is an unsafe condition whether the practice followed is normal or not normal.

I object and respectfully except to the several attentions given in the charge to the concept of the winch operator's handling or negligent handling of the load, particularly on this record, in which there is literally a totality or near total absence -- I think there is a total absence -- of evidence that there was a negligent act by the winch operator, who is unnamed and not testified about in any direct

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way whatsoever.

I ask the Court in that connection to advise the jury that it would be speculation in this case for the jury to find the winch operator mishandled the load, there being no such evidence in the case.

As respects the damages, your Honor at one point said that the damages -- and I except thereto -- are to be those which directly resulted from the injury. If the injury contributed, is one of the contributing causes to the condition claimed, it is sufficient, and it does not have to be a direct result.

With respect to the mitigation aspect, your Honor modified the language given throughout the plaintiff's claims in which it was stated that if you find the plaintiff has proven with respect to the defendant's responsibility, to say if you believe it has been shown, rather than if a defendant has proven to you that the plaintiff should have sought treatment, and I object to the change of the language and the failure to instruct the jury that the defendant has to prove it, not that it has been shown.

I ask the Court to instruct the jury that if Mr. Picinich's resistance to treatment, if they find there was such, is a sequelae, if they find it was a sequelae of his psychiatric condition or illness, then the award is not to be

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rdduced, even though he may have failed to obtain treatment.

I request that the Court charge that as to contributory negligence, the available of any other container to stand on is only to be considered if the jury finds that at the time in question he then had reason to know that the surface he was standing on was an unstable surface.

I except to the Court's failure to include words along those lines.

THE COURT: Well, I believe that I will deny all of those requessts to make changes, subject to what the defendants have to say.

I would like to say in general that the process of charging this jury in this case, like in all cases, is little different from the next case. I had from the defendants usual, general, what we call boilerplate charges, many of which were perfectly applicable but did not help, in my view, sufficiently to illustrate the real problems which the jury had to grapple with.

It is perfectly okay and I suppose it is safe and sound to simply give the boilerplate and drop it at that and let the jury go and flounder.

From the plaintiff's side, I simply -- I did not even have that. I had given to me two charges given by other judges, in other cases, one by Judge Motley in the Rubinich

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case and another by Judge Frankel in Adirosa -- somehow I don't have that group of papers.

Now, again, I studied those charges with some care and found that they were helpful to some extent, but it involved sharply different situations and did not provide what I considered to be sufficient guidance to this jury in handling this case. What we have here is not the situation that Judge Frankel was dealing with, where for some reason unknown fishnet doors collapsed or there was nothing to indicate -- there was really no other problem there.

Here we had a situation where there was testimony about different judgments regarding the way to properly secure containers on a still ship at a pier at the time of discharge. Without going into detail, it seemed to me incumbent on me, although at some risk of going beyond boilerplate, to assist this jury in knowing how to approach that specific question, and on that I got no help from any lawyer, and I simply went beyond it, and I will not retract from that.

On the question of the loose lashings at the top, that is not necessarily ipso facto unseaworthiness. It is not like the collapse of a girder or the collapse of a floor. There is an element, a much more sophisticated element the jury has to deal with. It felt it was important to give them some guidance beyond boilerplate, and that is the way we stand.

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Like in any formulation in the English language, there are problems, and I don't deny there are some here. If anybody can suggest an improvement I will be happy to consider it, but I am not going to simply abandon the whole thing.

Now, with that in mind I am perfectly glad to hear any real suggestions. I will go back to Mr. Friedman in a minute, but I have not heard from Mr. Kain.

MR. KAIN: The only exception I have to your Honor's charge as given is, I object to your Honor's charge that a former employee of the ship owner has an obvious interest in the outcome.

THE COURT: All right.

MR. LEONARD: I have the objection for failure to charge my original requests.

THE COURT: You mean the ones I ruled on last night?

MR. LEONARD: I do have some requests. I request the Court to charge the jury that the periodic calculations made by the plaintiff -- that is, on a year-by-year basis -- of money damage is an improper summation and should not be considered by the jury.

Under the law of the State of New York and the maritime law, saying the plaintiff is entitled to X dollars a year and inviting the jury to calculate that damage is an improper method of presenting a question to the jury.

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THE COURT: I am ignorant on that point, and it is very hard for me to deal with it. If it is clearly wrong, I would change it, but I thought it was okay.

MR. FRIEDMAN: I would not have done it if I thought it was wrong. If it is wrong, I have been doing it wrong for fifteen years. It is not wrong. As a matter of fact, the Judge's charge to discount -- there has to be an annual basis in order to apply a discount factor.

THE COURT: I will hope for the best on that one.

MR. LEONARD: I request you charge the opinion of the McGrath superintendent as to what should or should not have been done is competent in any action against the ship owner. I refer specifically to the recommendations contained in the McGrath superintendent's report as to --

THE COURT: I will deny that.

MR. LEONARD: I request the Court charge the jury there is no claim as to any medical expenses, and they are not to speculate or guess as to that.

THE COURT: I did not give it to them. Nobody had mentioned that.

MR. LEONARD: I request the Court charge that the charge by the Court as to future life expectancy does not imply that the plaintiff will continue to suffer from any condition whatsoever for the balance of his life or, indeed,

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that he continues to suffer from any condition to date.

THE COURT: I won't give t hat elaboration.

MR. LEONARD: I assume I have exceptions to that.

THE COURT: You do.

MR. FRIEDMAN: I don't know what your Honor wants me to say. I think each of the points I mentioned, if you want to consider any of the points, I will try to be more helpful. I thought I was more helpful in this case than I was in any other, when I get into another judge's charge on the precise proof. But I have never submitted a judge's charge. I have always submitted advocate's assertions, just as they do.

What I am being accused of, why I am being accused of being unhelpful is beyond me. That is for another time.

THE COURT: You talked about it being error to have spoken in the terms I did about the loose lashings.

MR. FRIEDMAN: Let me get to that.

THE COURT: If there is something that should be clarified, let's do it.

MR. FRIEDMAN: I thought under the law of unseaworthiness and what I think your Honor should charge, they have to find that it moved, you said --

THE COURT: I am talking about the lashings, the lashings left on top. Is that just ipso facto unseaworthiness?

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MR. FRIEDMAN: Let me put it this way:

If he was up on the box at the time the hatch boss decided to lift off the inboard container, he's up on the outboard container to remove lashings. If the hatch boss should not have instructed the winchman and the other men to go ahead with the lift-off while he was on top of the box, then that method of proceeding, that is not a momentary act. That takes a few minutes. That is a procedure.

If the hatch boss should not have gone forward at that time with him still up there, it is not Usner. It is an unsafe method of operation, and he is entitled to recover eventhough it is the act and selection of procedure of stevedores.

THE COURT: Maybe I have missed something, but it seems to me we are gradually working into a new claim that --

MR. FRIEDMAN: It's been in the case since the report.

THE COURT: I thought the unseaworthiness claim and I thought this was articulated several times. There was an unseaworthy condition, an unseaworthiness claim about the insecure condition of the containers, the lashings being loose, the absence of any other stacking devices or any other means to prevent horizontal movement.

Then I thought we had an unseaworthiness claim in the

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presence of the loose lashings on top, one or two of them, which caused them -- which caused him to go up there and have to do an unsafe operation because of the neglect of the ship's people to clean the things off.

MR. FRIEDMAN: I thought I made clear in the summation that there is a claim that once he was up on the roof, if only to fly a flat, once he was up on the roof of the outboard container, it was an improper method of discharging to go ahead with the lift-off of the inboard container while he was standing on the roof of the one immediately next to it, to wit, as stated in the superintendent's report of accident, whatever reason he went up there for.

THE COURT: The presence of the loose lashings: are you withdrawing the claim that that in and of itself is unseaworthiness? I think I can just remove that from the jury's worry. Is that withdrawn?

MR. FRIEDMAN: No. That is why he went up there: because they inadvertently left it.

THE COURT: Now there is an additional claim about the lift-off.

MR. FRIEDMAN: Exactly.

THE COURT: I think we have gone through that. The question would be whether it is enough to be unseaworthiness or whether it is this transitoriness which is simply negligence.

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What is the position of the defense?

MR. KAIN: If I apprehend Mr. Friedman's theory correctly, I believe your Honor's charge was correct, for the reason that your Honor, quite properly, I believe, told the jury that the factors of time -- in other words, he was up there to take it off. Did he have to take it off at that time? Did he have to be on that particular container at the time of the lift-off?

That was the purport of all of this testimony with respect to the plane of the falls. Captain Wheeler was asked in his opinion, and I believe Captain Ash was asked and others were asked that.

I believe your Honor's charge covered this. Part of the contention has been, and the testimony elicited is to show, an experienced longshoreman would not have been where he was.

THE COURT: This question of whether something is too transitory or too quick in time to be unseaworthiness versus negligence -- I don't claim to be able to solve it once and for all. I think it's a difficult question.

My understanding of the case is, though, that this type of situation -- in otherwords, the claim that the winch operator made the lift at a wrong time, namely, while plaintiff was standing on the top of the container -- I would find

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and I would hold that that was in the negligence category solely and not in the unseaworthiness category.

For better or for worse I have got to take a position, and that is the position that I believe is nearer right.

MR. FRIEDMAN: With all due respect, you are making a mistake.

THE COURT: I am sure you feel that way.

MR. FRIEDMAN: I feel that way with reason. I don't take positions unreasonably.

MR. LEONARD: You take them incorrectly.

MR. FRIEDMAN: I think I know this area. I know the Usner area. I argued the case in the Supreme Court that preceded Usner, the Waldron case, that dealt with all these issues.

Now, judge what Usner is. If the Hatch boss had given no order, they were just proceeding, and all that happened was the winch operator just juggled the controls, causing the bang. That's Usner. But where the hatch boss, as it is spelled out in the McGra report, prior to that, says, "Now, fellows, go ahead with the lift-off and lift up at this time," and that's a wrong thing to do, lifting off at that time. That's not Usner. Usner is very clearly, in its own language and in the cases that have analyzed it,

four decisions: single,momentary, isolated act of the winchman.

Here you have a decision by the hatch boss giving the signal to the winchman to proceed. As he proceeds, then it hits, and it's the hatch boss' decision, which is not a momentary, isolated act of negligence. That is a selected method of discharging, and that is not Usner.

THE COURT: All right. I just have to disagree with you. I will stand on what I have charged.

(In open court:)

THE COURT: There are no corrections or changes to be made in the charge.

I will now excuse the alternates. I am sure you understand you have been our insurance policy. This has been a case that has lasted over a period of two weeks, although we have had only eight trial days. If anything had happened to one of the regular jurors in the middle of this, we would have had to lose the benefit of all of our efforts.

Thank you very much. You are excused.

(The alternate jurors left the courtroom.)

(The deputy marshal was duly sworn.)

THE COURT: I want to say that you are entitled to request any of the exhibits. We won't send them all in now. All we will send in now is the verdict form.

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RDP 25[a]

If there are any exhibits which you wish, you send a note, and they will be furnished to you.

(The jury in the custody of the deputy marshal, left to the courtroom at 4:20 p.m. to commence deliberating upon a verdict.)

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(Court's Exhibit B was marked.)

(In the robing room.)

THE COURT: We received a note a little after 6, which we have gone over and marked Court's Exhibit 6.

"Could we have a clarification of unseaworthiness and negligence as they apply to this case? We believe that if defendant is not unseaworthy, he is, ergo, not negligent and conversely, if defendant is negligent he is also by definition unseaworthy.

"Thank you."

I tend to say they have made their own clarification, but that is obviously a serious problem. What do you suggest by way of answer?

We will start with Mr. Friedman.

MR. FRIEDMAN: I think part of the problem is part of what I referred to very briefly in the post charge conference, that the charge did not make as clear as it should have that there is a distinction between the unseaworthiness liability and the negligence liability with respect to the absolute duties, et cetera.

I don't want to speak unnecessarily lengthy, but I think the Court should clarify to the that it is not so that there is an inverse relationship. If they are negligent, then there is unseaworthiness. I think

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that is so.

I think one can find opinions. I recall a Frankfurter sentence, in Pope, Talbot & Horne, in which he says there is next to no imaginable case of negligence and yet no unseaworthiness.

THE COURT: I think we would agree --

MR. KAIN: I wouldn't agree entirely. I can conceive with the facts in this case of a situation where you have unseaworthiness resulting from negligence other than the ship owner's negligence.

THE COURT: The elements of unseaworthiness that I charged, and I am excluding for the moment because I didn't charge on it, I did not accept the last proposition of Mr. Friedman about what he said which is in the record. But the elements which I charged on with elements for which the shipowner is responsible, that is, the question about the loosening of the lashings on the container and the absence of any stacking plates causing the container to be insecure.

MR. KAIN: No question about that.

THE COURT: On that point the responsible ship personnel did it, knew about it. Every phase of that problem, whether its fault or not or unseaworthiness or not, it is the shipowner's and ship's personnel's

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responsibility, right?

MR. KAIN: With respect to that particular portion, yes.

THE COURT: Let us go to the other thing I charged on which was the loose lashings left on top of the container. Those loose lashings, if they were left, were left by the ship's crew who had done that work.

MR. KAIN: No question about that either.

THE COURT: Now is there anything, any other aspect -- let me put it this way: Is there any other aspect of the claim of negligence against the shipowner other than those two things that I charged about?

MR. KAIN: Not that you charged on. Because I thought concomitant with your Honor's charge you told them that you weren't attempting to cover all aspects and that they could find others. In other words, I understood you to tell the jury that your charge wasn't all encompassing and you weren't attempting to make reference to all types --

THE COURT: Let me putit this way: I did make it clear that any momentary negligence on the part of the stevedoring company couldn't be negligence on the part of the shipowner, and I illustrated that by the winch operator.

MR. KAIN: Yes, sir.

THE COURT: Now, let me just finish with Mr. Kain.

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What would you suggest we say?

MR. KAIN: I found no difficulty with your Honor's charge. I think it was accurate and I think it covered it. If they are only referring to what your Honor charged on that particular aspect and the references you made, I don't find any fault with it at all. But it occurs to me that Mr. Friedman in his summation this morning made reference to positioning of the boom and specifically told them, and I don't say they have considered this, but I believe he specifically pointed out to them that even though this condition -- accurately in this respect -- if this was an unseaworthy condition, it was created by the stevedores who obviously positioned the booms --

THE COURT: I don't think he talked about the positioning of the booms this morning. What he did say is, he talked about method. But what he was talking about there was the commencement or carrying out of the lifting operation at a time when Mr. Picinich was on the container pulling up the loose lashings.

Now, frankly, when I heard him I thought that the emphasis was on -- as far as unseaworthiness, was on the loose lashing and consequently in my charge I did refer to the loose lashing problem at one point when I was describing the claims of unseaworthiness and I reiterated in two or three

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ways the necessity of finding a condition.

If you think that there is some --

MR. KAIN: As I tried to state before, I find your Honor's charge on both unseaworthiness and negligence to be accurate, but I envisage from what was said in summations, for example, the McGrath report was read and I thought -- here again I am going on recollection -- I thought Mr. Friedman argued that if the hatch boss ordered this container lifted at an improper time, even though this was the hatch boss' order about which the ship knew nothing, that this created liability on the part of the ship.

THE COURT: Let me read you part of the charge. I think the problem that you are concerned about is the possibility that the jury has in mind the claim which was alluded to in some way by Mr. Friedman, that there was unseaworthiness because the winch operator started work whilethe plaintiff was on the container.

MR. KAIN: I thought also in your Honor's charge you made reference to the fact, and I believe accurately, that there was the question of time interval, if he had been told he should remove these, he had the option to do it at that time or some other time.

THE COURT: That's a different phase. That's contributory negligence.

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Let me read to you, and you are perfectly correct, I did not in so many words list the plaintiff's claims at any particular point but I did read this as part of the charge.

"As you know, plaintiff's claims of unseaworthiness relate to conditions other than the momentary handling of the winch and the bumping. Conditions which are claimed to have existed for some period of time, such as the alleged insecure condition of the containers after the lashings were loosened or removed on Sunday, July 11th, and the presence of the one or two loose lashings on the container where plaintiff fell from."

In that spot I did list those two claims of unseaworthiness as distinct from the momentary handling of the winch.

MR. KAIN: That is true.

THE COURT: Later on in the charge when I was trying to illustrate some points about two of the claims, I talked specifically about the loose lashing, the loose lashing-stacking device problem, and I talked about the problem of the lashings left on the top of the container; do you recall that?

MR. KAIN: Yes.

THE COURT: I doubt very much in view of the instruction the jury would be considering any claim that there

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was unseaworthiness or even negligence on the part of the shipowner becausd the winch operator started to work.

MR. KAIN: I didn't mean to suggest to your Honor thatthey were considering this at all. The only point I meant, since your Honor's instructions, as I understood it, that you weren't attempting to list for this jury precisely and review all of the testimony about the packing of the draft, plane of the falls, the whole body of testimony, that this was illustrative of dertain things. But I do believe your Honor's instruction to this jury on seaworthiness or unseaworthiness and negligence was accurate and I would not like to have you say to this jury as a general proposition at this point that any negligence in this case has to be that of the shipowner.

THE COURT: How about saying that any negligence on the part of the shipowner would necessarily in this case have to involve seaworthiness. Of course, it is only negligence on the part of the shipowner we are concerned with. Couldn't we do that?

MR. KAIN: My first impression that it is reasonable. It would be an unseaworthy condition created by negligence.

MR. LEONARD: My understanding of Professors Gilmore and Black in their book of admiralty say that

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while it is true it is difficult conceiving, a shipowner may be negligent and the vessel unseaworthy.

The example they give is an assault by an admittedly competent, level-headed person of a vessel on someone. That's a pretty wild case. But not in this case. In this case I think that any unseaworthiness --

THE COURT: Haven't we agreed on the first proposition, that any negligence on the part of the shipowner would necessarily in this case have to be unseaworthiness?

MR. LEONARD: Yes.

THE COURT: Now, let us talk about the second proposition.

MR. LEONARD: Which is what you charged, I think.

THE COURT: Now, the second proposition which the jury advances is that any unseaworthiness would automatically have to be negligence and if there isn't unseaworthiness there cannot be negligence.

MR. KAIN: In the context of this case, again my reaction is that that is a fairly accurate statement.

THE COURT: What do you say, Mr. Friedman?

MR. FRIEDMAN: I say no.

THE COURT: You tell me, applying to this case and not a lot of general statements, what in this case, and

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let us suppose that the jury finds -- because this is where it would be binding -- let us suppose the jury finds no unseaworthiness, how could they find negligence?

MR. FRIEDMAN: It is the other way around. We agree if they find negligence, that any negligence finding with respect to the shipowner would be and would render the vessel unseaworthy. We have agreed on that.

The question is the othr way around. Could they, within the facts of this case, find the vessel unseaworthy and yet exonerate the defendant shipowner from the charge of negligence? That is the question.

THE COURT: I don't think that is your real problem that you have to worry about.

MR. FRIEDMAN: That is the question they have asked. They want to know that. If we find it unseaworthy does that mean it is negligent and --

THE COURT: Wait a minute.

"We believe that if defendant is not unseaworthy he is, ergo, not negligent."

That's the real problem for you. Obviously if they find him unseaworthy, you don't particularly care about the negligence. But we will put that aside.

The real problem, it seems to me, is just exactly the proposition stated by the jury.

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MR. FRIEDMAN: May I hear it again? I digest things better when I read them.

THE COURT: All right.

(Pause.)

MR. FRIEDMAN: I think what we have here is actually, let us call it three questions or two, the first is, could we have a clarification of unseaworthiness and negligence as they apply to this case. Then there is another question, which I will take as one question, if you believe defendant is not unseaworthy, ergo, he is not negligent. And conversely, if defendant is negligent he is also by definition unseaworthy.

THE COURT: Let us take the second question because that brings it to focus most clearly.

MR. FRIEDMAN: It is not okay because I don't think it brings it into focus because I think what the jury is asking for, and I did take exception in the initial charge, is the clarification of the distinction between the absolute nature of the unseaworthiness liability, that it is a species of liability divorced from negligence, and that it does not depend on negligence doctrines at all.

THE COURT: That is a lot of general discussion. Now you tell me in this case.

MR. FRIEDMAN: That's easy. In this case, which

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brings us back to the question, in this case it is very easy for the jury to find unseaworthiness without negligence. They may not have regarded it as a deviation from reasonable care. If you take Wheeler's testimony and accept it, then this was normal, reasonable and well within the kinds of care that is ordinary and regular to use the lashings and not use the stacking devices, et cetera. Being done all the time, normal, regular, reasonable care. And that's what the law of unseaworthiness is all about. You can be as careful and reasonable and ordinary and in accordance with regular practices as you want, if the result of that is that you have set up an unsafe working surface and situation there may neverthe less be absolute liability as a species of liability without fault because the condition of work is unsafe.

THE COURT: That doesn't apply to this case.

MR. FRIEDMAN: It doesn't apply to this case?

THE COURT: I went over --

MR. FRIEDMAN: I don't begin to understand that.

THE COURT: I went over Judge Weinfeld's charge, Judge Motley's charge, Judge Frankel's charge, two of which you referred me to prepare my charge on this case.

I will take Judge Weinfeld's charge because usually he goes into a little more elaboration. This is a

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charge on unseaworthiness. Falsoc against A.S. Iverans, 70 Civil 3074.

His instruction on unseaworthiness is full of language about reasonableness, as we all know. Now it also talks about the unseaworthiness duty being absolute. It seems to me we have to have a fairly sophisticated look at the purpose of using those two words. Unseaworthiness is an absolute duty in the sense that if something is -- let us just forget the word reasonable for a minute. Let us suppose I am walking on a deck and under that deck it is supported by a timber and that timber is rotten. Now, nobody could somewhow discover the rottenness of that timber. It is concealed. It wouldn't be discovered in reasonable inspection or periodic maintenance. It is a latent defect. The surface will collapse under the normal weight of the normal man. The surface is unreasonably weak for the intended purpose, and therefore it is unseaworthy and the defendant shipowner is liable. The liability is absolute in the sense that the shipowner is liable whether he knew about it or whether he should have known about it. Even if that condition was caused by the manufacturer of the beam or some act of God or something, it is absolute in that sense.

But the shipowner doesn't have a duty to provide --

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but still the concept of reasonableness comes in in another sense, as Judge Weinfeld's charge and Judge Motley's charge and every other charge given in this court brings out.

For instance, Judge Weinfeld's charge --

MR. FRIEDMAN: Judge --

THE COURT: You raised this.

MR. FRIEDMAN: I argued it ten years ago in this circuit. the name of the case is DeLima, and that is --

THE COURT: Please, I beg to have you let me finish.

"The law about unseaworthiness imposes upon the owner of a vessel the duty to supply crew members with a seaworthy vessel, that is one reasonably fit for its intended purpose or use. Or stating it another way, one reasonably adequate and fit for crew members to discharge their functions."

MR. FRIEDMAN: We are not arguing that. The point is thatthis second --

THECOURT: Just a moment, please.

"In deciding whether a vessel is seaworthy the standard to be applied is not absolute perfection but reasonable fitness for its intended use. That is reasonably adequate for the men to do their jobs with reasonable safety. Seaworthiness is a relative concept, depending

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in each instance upon the circumstances in which the ship's reasonable fitness is drawn into question," and so forth.

What I am trying to illustrate to you, Mr. Friedman, is this: That you cannot take a kind of simplisitic view of the words. The words are used in two different -- the word "absolute" is used for a particular purpose in this rule and the word "reasonable" is used for a particular purpose and you have to keep that in mind.

What I am leading up to is, I think under the facts of this case, where there was no latent defect, where whatever was wrong or right, and where the question is the reasonableness -- the question under Judge Weinfeld's charge is the reasonable fitness of these appurtenances and arrangements, I say that we can't go out and tell the jury that they are to disregard the concept of reasonableness in judging unseaworthiness. It could be contrary to the law. Certainly it wouldn't apply here. Therefore, in this case I think the concepts merge.

If you can tell me, in a really realistic way how they don't, I'd be happy to hear you, as applied to this case.

MR. FRIEDMAN: What has to be reasonable for where the reasonableness consideration comes in is whether the security of this working surface does not have to be

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absolutely secure, something that wouldn't move under any circumstances whatsoever. That is the reasonable testimony.

Whether the failure of it to be reasonably secure result from care or knowledge or non-care or non-knowledge does not enter into the absolute or the liability with respect to seaworthiness.

If it was not a reasonably secure -- in the circumstances of this case by that I mean since it is uncontested that the prospect of it being struck by another container was well within the foreseeable range of ordinary discharging duties --

THE COURT: That is part of the seaworthiness concept, is it not? What you are telling me now is part of the seaworthiness doctrine.

MR. FRIEDMAN: That is what I am saying.

THE COURT: That is what I told the jury.

MR.FRIEDMAN: I have my own views on that. What I am trying to say that since, in this case, the claim is that it was struck by another container; that that was well within the foreseeable range and that therefore if this container moved when struck, the reasonable fitness test is met. In other words, it was not met, it was greached. Therefore, whether it was secured with reasonable

care is what distinguishes it. There was a lot of testimony offered to this jury that they proceeded in accordance with reasonable care, with regular practices. And that doesn't matter on the seaworthiness claim. They may have done so. They may have followed regular custom, if the jury decides to believe that that is so. But if what they followed resulted in a work surface which was not secure against such a thing as a foreseeable bump by another container immediately adjacent to it, well within the foreseeable range of unloading operations, then it was not a reasonably fit, a reasonably safe location, although created with reasonable care.

THE COURT: The thing is, Mr. Friedman, I would say this: If that arrangement was unseaworthy in the sense you have defined it, and that is the same as I defined it to the jury, then I don't see how these people escaped negligence. Because they created it. If it was reasonably foreseeable, then it would have to take the bumps of another container and be subjected to that kind of thing and move, that's what makes it unseaworthy and that's what makes it negligence.

MR. FRIEDMAN: Not necessarily so. We cannot supplant the jury in this regard. Your Honor has certainly not supplanted the jury in submitting certain other issues

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very ephemoral indications because you decided the defendant was entitled to have them, the winch, the mitigation and a couple of other things. And the jury could, whether your Honor is sitting as a juror would or would not reason that way, a jury could reason that they accept that the roof surface was not reasonably safe and secure even though the shipowner followed a lot of reasonable care, caution and regular practices in building it that way. They could make that finding.

Your Honor might not make that finding but it certainly was the thrust of some of the evidence that was here presented and elicited by Mr. Kain and the jury might be moved by it, whether or not your Honor was.

THE COURT: Let us just take the jury's question.

"We believe that if defendant is not guilty of unseaworthiness, ergo, not negligent," now, I want you, please,to assume -- let us just take that proposition. Assume that the defendant has been found not unseaworthy. Would you please tell me how the defendant could be found to be negligent in this case?

MR. FRIEDMAN: Well, we have among other things, your Honor, whether or not we argued ever point in summation, it was not withdrawn, that is, the absence

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of the ship's officer with respect to supervising the discharging -peration.

THE COURT: That was expressly withdrawn about twice in the trial. Let us go on to something else. It was not argued in summation.

MR. FRIEDMAN: That doesn't mean it is withdrawn. One doesn't have to argue all points in summation. It was testified to by Captain Ash and it was certainly not withdrawn.

THE COURT: I don't think it was even testified to by Captain Ash because I sustained an objection and you didn't ask the question.

But I hear your viewpoint. Is there anything else?

(Court Exhibit B was marked.)

(Pause.)

MR. FRIEDMAN: Your Honor, there is something I need from my file to helpe me answer your Honor's question.

THE COURT: All right.

(Pause.)

MR. FRIEDMAN: Your Honor, what I went to my file to get were the special questions submitted in the Rubinich case. It is a fact that juries identify with

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negligence and not with unseaworthiness claims. The case indeed resulted in the jury responding that, yes, they found the vessel owner negligent and, no,they found the vessel was not unseaworthy. Judge Motley, in answer to the special questions and notwithstanding there was liability found and liability confirmed. So that a jury response that they find negligence but no unseaworthiness is not that rare.

In fact now that I think about it further you will find a decision by Judge Gurfein, called "Ayala," where the same situation arose. juries have again and again, notwithstanding, as Judge Gurfein points out, "It doesn't necessarily commend itself to our rationale. We have a hard time seeing how they reasoned it out but they nevertheless have concluded in different cases from time to time where they perceive negligence but they don't perceive unseaworthiness. Whether it is because of the digestibility of the terms or not I can't comment but it happens. It happens particularly in longshoreman's cases where the situation is set up this way."

So it is not appropriate to tell the jury just like that that one is the converse of the other and the equal of the other and indeed we know the maritime law is replete with a distinction between the two. I think certainly they have asked for that and asked to be told about that in the

first question that is before them. I think that the proof here, a longshoreman, is entitled to have this jury explained to, and that is the purpose of this question, because it didn't get through to them, that there is a distinction. One is a species of liability that is divorced from the other, and that should be, and the plaintiff is entitled to the protection of seaworthiness. We are entitled to have explained they are species divorced from the other, species of liability.

Do you have anything else?

MR. FRIEDMAN: No.

THE COURT: All right.

(In open court.)

(Jury present.)

THE COURT: Let me read the note which we received about an hour ago which we have been discussing with the lawyers for most of that time since then.

"Could we have a clarification of unseaworthiness and negligence as they apply to this case? We believe that if defendant is not unseaworthy he is, ergo, not negligent. And conversely, if defendant is negligent he is also by definition unseaworthy."

It is signed by the foreman.

In some 45 minutes of discussion nobody was able

to articulate in any way that I could understand any difference in thiscase between the two concepts. And I have been talking to the lawyers now for, I guess, 45 minutes, that whole time, and neither they nor I were able to articulate any difference which I can understand or which I could convey to you in any meaningful way.

I will say this for your benefit, and this may repeat what I gave you in the charg - that the legal theories are different. Unseaworthiness is a stricter standard in theory and in law. And in a given case there might very well be liability for unseaworthiness and no liability for negligence.

For instance, and I think this is the kind of case that the difference comes into play and I think I mentioned it this morning. Let us suppose that a seaman of normal weight and walking normally is walking down a deck of a ship and the deck collapes under his weight. Now, a deck is supposed to be reasonably fit, using the kind of language I gave you this morning and which all the judges charge on unseaworthiness. It doesn't have to be perfect, it doesn't have to be able to withstand the biggest wave that could possibly drop on it or some other huge weight, but it certainly obviously has to be able to withstand the weight of a seaman walking in a normal manner,

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doing just about anything a seaman would have to do on a ship. And it it collapses under his weight it is not reasonably fit for its intended use.

Now, the shipowner would be, I think, clearly liable for unseaworthiness there. I don't think anybody in this room would deny that.

Suppose a claim of negligence were brought so that the jury, and what you are asked to do is asked to determine, whether in addition to the breach of the unseaworthiness duty, the shipowner was negligent. Well, let us suppose on investigation it turned out that the collapse of that deck was caused by a weak beam and there is what we call a latent defect that the shipowner had no way of discovering. The defect was caused by U.S. Steel Company out in Gary, Indiana. Well, maybe U.S. Steel is negligent but the shipowner wasn't negligent. The shipowner didn't know about the defect, didn't make the defect. Nobody knew about it and failed to do something about it. You couldn't say that any seaman or the captain or the chief officer found out and just sat back and didn't do anything, or that you couldn't find that they were making the proper inspections. No personal fault on the part of the ship's people.

So there you would definitely have a difference.

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The shipowner would be liable on the doctrine of unseaworthiness and not liable on negligence.

Let us suppose another case where the theories might create a distinction. Let us suppose there is an unseaworthiness claim because of an allegation of defective equipment and let us suppose that the plaintiff also says that in addition to the equipment being defective a ship's officer momentarily misused that equipment. So maybe a rope on one of these booms or falls broke and at the same time a ship's officer was operating the thing or a crew member and did something wrong, momentarily. Well, it is conceivable there that the plaintiff might lose on the allegation that the equipment was wrong but might win on the idea that the momentary misuse occurred.

So in a particular case the shipowner might lose -- I mean the plaintiff might lose in trying to establish bad equipment but might win on negligence in saying that the ship's crew member or the officer momentarily misused the equipment.

All right, I think everybody understands it.

So, yes, in other cases there might be differences. When I was instructing you I didn't want to summarize every claim because I didn't want to go into all the contentions of all sides. They had stated their contentions, but

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I think for the purposes of clarification the only claims that I was really instructing you about, and I think I will define the basic claims of unseaworthiness which are presented to you and I am sure this repeats what you already know. And I referred to these things in my charge.

First of all, the claim, getting to this case, the claims of unseaworthiness, these are the claims for your consideration. First of all, that the container on which the plaintiff was standing at the time of the fall was unseaworthy because it was unreasonably insecure because the lashings had been taken down and there were no stacking plates there to prevent horizontal movement. Let us call it one basic claim of unseaworthiness. You have heard endless discussion about that and you are thoroughly familiar with that.

The second claim, if you will, although the two are related in a sense, of unseaworthiness was that on the top of the container there were one or two loose lashings which had been left and were lying there Monday morning and the claim is that these should have been removed, cleaned up the day before by the ship's crew. The fact they were still lying there so that the plaintiff had to go up and remove them, that constituted an unseaworthy condition.

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That, I believe, summarizes the claims of unseaworthiness that are before you for consideration.

I excluded from your consideration any momentary act of a winch operator because it is a momentary thing rather than something lasting for a few hours, something like that. Any way, I excluded from your consideration any momentary act of the longshoreman who was operating the winch because under the law I do not believe that can constitute unseaworthiness. So we are back to the situation I described a moment ago.

Now, the question basically about those two conditions is what I submitted to you in general terms. The question is, was that container in the situation thatyou fin that it existed, whatever you find on the evidence, was it reasonably fit, and I emphasize reasonably, it doesn't have to be perfect or the best possible one, but was it reasonably fit for its intended purpose or use? Stating it another way, reasonably adequate and fit for longshoremen to perform their functions on?

If I recall, I gave you a somewhat elaborate statement of considerations in determining that question of reasonable fitness.

Now, in my view, and in answer to your question, in this case if you find that the plaintiff has not proved

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by a preponderance of the evidence that situation was not reasonably adequate -- and I am using a lot of negatives because the burden of proof makes it shape up that way, but if the plaintiff has not proved the unreasonable condition in the terms I have defined it, then if the plaintiff has not proven that, I don't see any way that you can find that he had proven negligence on the part of the shipowner. If you find that he has proved that situation was unreasonably unsafe -- let me put it this way: If you find the plaintiff has proved that the situation was not reasonably fit, in the terms that I discussed with you, then I believe obviously, that would be unseaworthy and it would also be negligent.

Why? Because the shipowner knew about that situation and created it.

If you started from the other end and if you found that the shipowner was negligent in creating or permitting an unreasonably dangerous or risky container arraingement here, if you find that he was negligent it would follow that there would be unseaworthiness.

Now, if you found that the shipowner was not negligent in that -- and this is the only way you could find

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the shipowner not negligent -- if you found the shipowner was not negligent or if you found that the plaintiff hadn't proved negligence, what that would mean is that you hadn t found that the plaintiff had proved that the shipowner had created and permitted an unreasonable and unfit condition. If he didn't do that there is no seaworthiness.

So no matter how you slice it, it seems to me that the long and short of it is that in theory there are somewhat complex distinctions. I hope I have illustrated them. I believe, however, that in the note you have analized it precisely correctly for this case. At least I can't think of any other way to put it.

Why don't you go back.

(Jury continues deliberations at 7:15 p.m.)

(In the robing room.)

MR.FRIEDMAN: I would like the record first to indicate I have a total and general exception to that which just occurred in the courtroom.

Now, more specifically, I think it is critical at this moment to say that we started off with two questions and somehow we totally lost the analysis.

Without reviewing the argument I lost before we went before the jury, what we had was the first question as follows: If not unseaworthy he is, ergo, not negligent.

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Your Honor became convinced that that followed in this case. I wouldn't review that, although I disagree.

Then the next question: If defendant is yes, negligent, he must also be yes, unseaworthy.

Everybody agreed to that.

There is a third question which was not asked but created and answered by your Honor on the benech without any discussion with us. May he be yes, unseaworthy, and still not negligent? And your Honor told the jury not so. If he is yes, unseaworthy he must be negligent. Therefore, if he is not negligent, he is not unseaworthy. Indeed you not only left that by implication, you said that.

Judge, that is dead wrong. I can't believe you even intended to do it. Did you intend to do that?

THE COURT: I absolutely did.

MR. FRIEDMAN: Judge, how can you --

THE COURT: We don't need any motion or anything like that. I am prepared with perfect equanimity to accept your exceptions on the record. I have thought of this problem last night, today and my thoughts can be wrong but unfortunately it is the best I have. I don't have any other thoughts and I cannot wilfully simply accept the thoughts of counsel. It has to come through me and I have done the best I can.

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Really the basic thing is this jury has made a rational analysis, not the kind of irrational analysis that was suggested before we went into them. I congratulate them.

MR. FRIEDMAN: We didn't even discuss this question. We never discussed the proposition of telling the jury that it was impossible to find yes on seaworthiness and no negligence. That was an impossible finding. If we discussed it for one moment --

THE COURT: Just make your point but not a lot of emotion.

MR. FRIEDMAN: My point is that the jury could under the facts of this case find that the box was not reasonably secure, i.e., an unseaworthy condition, but reasonable past custom and practice had been followed in creating the condition even though the shipowner knew of it. They could so find. That is the simplest and most direct way --

THE COURT: Not under my instructions. It wasn't posed in that way. I don't think they could find that under the circumstances. If anybody came to me with that proposition I would reject it.

I think it is wrong and I couldn't accept it.

MR. FRIEDMAN: I respectfully submit you have ignored the chief officer's testimony and others that this is

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the way they always did it.

THE COURT: That would not under the facts of this case in my view -- you defeat a negligence claim. I am happy that you are making a defense argument on the point, but that is the kind of thing I would expect from Mr. Kain or Mr. Leonard. If they made it I would reject it.

MR. FRIEDMAN: The jury can and indeed there are thousands of cases in which the fact that the usual regular practices was followed constitutes a jury viable defense to negligence but it didn't to unseaworthiness.

The other thing I have, you told them that there were two separate claims when the two claims interlock.

THE COURT: I told them they interlock.

MR. FIREDMAN: Not to my hearing, your Honor. You did not tell them they interlock. The whole point of thiscase really is thatthat container, when it was loaded was not necessarily loaded forthe intended use that it ultimately came to be used for. It was not intended that somebody would get up on the roof to pull off lashings and to be up there when it got bumped. That was not its intended use but it came about because the lashings were left on, or for whatever reason, that a man was up there and it was being used for that purpose. In telling the jury and in focusing the jury's attention on the intended use as

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being the basis on which to find that it was an unreasonably unsafe condition, everything couched in the negative when that is not at all the grain of the law, is nto correct because the plaintiff's contention is here whether or not it was a reasonable stowage in terms of the ordinary intended, expected use of the container, when it came about because they left the lashings behind that a man had to go up there and stand on it, not the ordinary intended purpose of the second tier roof, then at that moment it became his working surface, his walking surface, however unintended it may have been when it was stowed, and the two claims interlock. If it was not a reasonably safe place for him to be standing --

THE COURT: I really told them that. I don't think you understood that.

MR. FRIEDMAN: Your Honor didn't tell them that at all.

The whole presentation of this charge to the jury has been in negative terms of putting them to finding it was something unreasonably unsafe, which is not at all the grain of the law.

I must say, your Honor, I have heard enough charges to tell your Honor that it is so totally unlike anything that's been presented. Even Judge Weinfeld's charge is not like that, constant reiteration of the negative presentation.

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There was also the claim, which was now totally omitted at this critical time with the jury, that there were improper package lashings which required the roof work to hook up instead of the ladder access. I assume that that telegraph description of it is accepted by the court of what was developed with a lot more language out in the trial.

THE COURT: That is just another way of saying that the lashings were off. At the time of the discharge the lashings were off.

MR. FRIEDMAN: They packaged the four containers, the eight containers alltogether in one package instead of in separate packages as Captain Ash testified they should have been. In which case there couldhave been access to the roof hookups by side latter. That is included.

MR. FRIEDMAN: How is it included in the two items you put before them? It was omitted. Not at all there.

THE COURT: You mean the space between the --

MR. FRIEDMAN Yes. I think your Honor has to make it clear when you talk of intended use --

THE COURT: Let us get them back. I will add that.

MR. LEONARD: I have a word to say on that.

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Your Honor correctly analyzed before when you said these things were unseaworthy when the lashings were off. Any prior situation, good, bad or indifferent, is merged into the fact --

THE COURT: I think Mr. Friedman is right on this. Get them in.

MR. LEONARD: I would except to such a charge.

MR. FRIEDMAN: Since you are calling them back, I would make it clear that intended use, when you use that phrase to them, meas that they have to consider whether it was reasonably safe for a man to stand on the roof when it came about on the morning of July 12th, that a man did have to go on the roof, whether or not that use was anticipated.

Any time when you tell them intended use for loading, the lay jury has to think or is likely to think in terms of what was the reasonable expectation and outlook when it was being loaded and not to think in terms of when it suddenly became something that was being used as a working surface. That developed only on the day of discharge. Why can't the jury be told that it has to be safe for that purpose?

THE COURT: Well, it has to be safe for --

MR. KAIN: It has to be safe for its intended use.

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MR. LEONARD: Mitchell v. Trawler Racer, is the language you charged.

MR. FRIEDMAN: With something like this, a container cargo, and that is where you have your cargo cases again and again, a portion of cargo box as a working surface because of the ongoing or manifestations of the on-loading procedur It has to be safe for that purpose or he recovers. That is what the law of seaworthiness is about. Very important aspect.

THE COURT: I am definitely going to refer to the claim, which I think is a jury question, about whether there was unseaworthiness created by the spacing.

Now, on this question of intended use it doesn't seem to me, Mr. Friedman, I think it is a jury question as to whether -- just stating it in the most general terms, as to whether the arrangement of these containers, given all the facts and we don't have to repeat them, that it existed was reasonably fit for its intended use or their intended use within the meaning of those cases.

That is a general proposition. Now what youare saying is that I should tell -- no disagreement, that is one basic jury question; right?

MR. FRIEDMAN: Okay.

THE COURT: Now, what you are asking me to do is to

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tell them specifically that an intended use should include a longshoreman walking on them; right?

MR. FIREDMAN: Not exactly right but it is close to it.

THE COURT: Be more precise.

MR. FRIEDMAN: It is not a matter of intended use. When in fact in the course of ship's work, not on a frolic of his own, but where in the course of ship's service a man is called upon to go on a working surace which is cargo, that is a use for which it must be fit and safe, reasonably fit and safe. Even though it may not have been the use for which that surface was intended when it was on-loaded or at any other time.

THE COURT: Frankly --

MR. FRIEDMAN: The intended use is transient, depending on the service called for. That must be made clear.

THE COURT: I think he is right on that.

MR.LEONARD: I have an objection.

THE COURT: I really think that is almost implicit in the case.

MR. KAIN: It certainly is, your Honor. That's my point.

MR. LEONARD: Let me put my objection on the

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record. I think when the jury asked the question does not unseaworthiness imply non-negligence, the answer to that question could have been made simply yes.

Does negligence in this case imply unseaworthiness? Yes.

The extent that the Court elaborates on any other charge at this juncture in the case creates an undue emphasis in the jury's mind on what may or may not be elements of unseaworthiness.

Your Honor's original charge was a balanced presentation.

THE COURT: Wouldn't you agree that Mr. Friedman's proposition is correct, that at thistime the container had to be reasonably safe for a man to walk on it?

MR.LEONARD: No question about it. What I am sayingis there will be undue emphasis.

THE COURT: I amnot as worried about that possible psychological overtone as confirming what is implicit and making it clear. If Mr. Friedman feels that there is a possibility of some confusion, I think the main job is to get it cleared up and I will instruct them. This happens all the time. Sometimes you go out and say there is a feature which has been mentioned and it's been implicit all along.

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MR. KAIN: May I just be heard on this? Your Honor certainly charged them precisely this, that it had to be reasonably fit. You did it at length in your original charge. It certainly is foreseeable in terms of negligence versus seaworthiness what your Honor was just answering the questions on. If the shipowner creates this and if they leave the lashings there it certainly is foreseeable that they are going to have to go up there and remove it. It is foreseeable by the shipowner who created it. It doesn't change your Honor's answer to the question that you just answered for them. In my view it is impossible for the shipowner not to be negligent if it is unseaworthy and vice versa. I don't see how it changes it at all. I agree with Mr. Leonard, this constant repetition of the same thing to the jury, bringing them back, must necessarily create in their mind confusion.

THE COURT: They asked a fairly sophisticated question. We wouldn't be bringing them back at all if they hadn't asked that question.

Heaven knows what the proper way to have answered that question was and maybe there shouldn't have been any elaboration at all. But I felt that they appreciated it. My judgment of their reaction was that they were quite interested and appreciated it.

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Now, I don't think that we are overdoing it. They are working hard on this case and my judgment is that if there is a fear of confusion on their part, I will clear that up.

MR. KAIN: May I say one more thing? If your Honor is going to charge the space thing within the context of this case I don't think that changes your Honor's last answer to them.

THE COURT: No, it doesn't.

MR. KAIN: Because there again, it is foreseeable if it is an unseaworthy condition on the spacing it certainly is negligence on the part of the shipowner.

THE COURT: I agree. I have to do a little more. Let us go on.

(In open court; jury present.)

THE COURT: I apologize for bringing you back but you asked a very astute question and I think your reactions showed a great deal of discernment and I got into what perhaps was an overlong explanation. But in doing so, one point I think should be clarified, I was enunciating or trying to enunciate the unseaworthiness claims, as you recall. I put them in terms of two claims which I gave you and I won't repeat them. I also indicated to you that you would be entitled, if you chose, to consider them in a

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sense a unity. The real question is whether the situation in its entirety was unseaworthy or not.

Now, there is a third element which Mr. Friedman spoke of this morning and reminded me of, and I think this is something the jury is entitled to consider in connection with the overall question, and that is the claim of the plaintiff, and which I did omit any reference to right now, and that is this: The claim of the plaintiff that it was an unseaworthy condition to have the spacing of the containers as they were. The claim of the plaintiff is that there should have been room between the aft stack of containers and the forward stack of containers so that a man, if he had to go up and hook on or take off a lashing, he could have gone up a ladder between the aft container and the forward container. You will recall the summation this morning. I am sure you had that in mind but I omitted it.

Finally, this is a point that really has nothing to do with your question, and I am sure it is implicit. In giving you these partial statements I don't want you to consider that there is any particular weight given to any particular point. Obviously I am not going to repeat the whole charge. If there is anything to be done now, it will be one point or another. But you recall

I charged you at some length and gave you the definition of unseaworthiness in terms of reasonable fitness for intended use, and we talked about that word reasonable at great length.

Now, intended use, and I am sure you understand, and I am just saying what was obvious from the entire case, this time had to encompass the idea of some longshoreman, the plaintiff here, walking on the container to do necessary work.

All right, you may go back. I think we won't interrupt you again unless you call for us.

(Jury continues deliberations at 7:40 p.m.)

(Jury verdict at 8 p.m.)

(In open court; jury present.)

THE CLERK: Ladies and gentlemen of the jury, have you reached a verdict?

THE FOREMAN: We have.

THE CLERK: Mr. Foreman, will you please rise and read the answers and questions from the form.

THE COURT: Read the full questions and answers, will you please.

THE FOREMAN: "No. 1. Do youfind that there was an unseaworthy condition on the Concordia Viking which was a proximate cause of plaintiff's injury"

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The answer is no.

"2. Do you find there was negligence on the part of defendant shipowner which was a proximate cause of plaintiff's injury?"

Answer: No.

THE COURT: That would be all the questions you would be required to answer.

Thank you very much, ladies and gentlemen, for your attention. I repeat the expression of gratitude I made at the beginning of the charge. I believe this jury service is finished.

Does anyone want the jury polled?

MR. FRIEDMAN: Yes.

THE COURT: Poll the jury.

(Jury polled, all jurors answering in the affirmative when asked the question "Is this your verdict"?)

THE COURT: Now, does this conclude the jury service?

THE CLERK: They are excused and I have their forms which I will give to them.

THE COURT: Thank you very much and goodnight.

(Jury excused.)

THE COURT: The verdict form will be Court Exhibit E.

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(Court Exhibit E was marked.)

THE COURT: Are there any motions or will there be any motions?

MR. FRIEDMAN: In the first place, your Honor, I realize that we never marked for the record the submissions on the requests to charge. The record should be complete in that regard. Of course the defendant's requests as well as the plaintiffs.

THE COURT: Now, I will hand to you your marked-up copy of the charge of Judge Motley, I will hand to you the excerpts from the charge of Judge Frankel. Then I will hand to you your additional requests to charge submitted at 3:30 yesterday and you can have those marked for identification.

Do the other parties wish to have their requests marked?

I think Mr. Friedman idea is a good idea to mark it.

Do you want them marked, gentlemen?

MR. KAIN: If we are making them we should mark all of them, I assume.

THE COURT: I will give them back to you.

Mark Mr. Friedman's exhibits as plaintiff's exhibits.

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There was an additional request from McGrath which we will have to mark later as an exhibit. It is still back in my chambers.

MR. LEONARD: Yes, your Honor.

MR. FRIEDMAN: There was also a memorandum that I submitted.

MR. LEONARD: There was a number of memorandums.

MR. FRIEDMAN: There was a memorandum related to the requests to charge. That's the one I am referring to.

THE COURT: This is the one received the 15th of October.

(Plaintiff's Exhibits 16, 17, 18 and 19 were marked for identification.)

THE COURT: I think Mr. Friedman wants a memorandum marked.

MR. FRIEDMAN: The reason I do this is because there was some reference on the record as to whether I had called the Court's attention appropriately to certain authority and I want my record to be complete.

THE COURT: That's fine.

MR. FRIEDMAN: With no failure to do so.

(Plaintiff's Exhibit 20 was marked for identification.)

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MR. FRIEDMAN: There was another memorandum which I cited to the Court Judge Murphy's charge as affirmed by the Second Circuit in Williamson.

XX (Defendant's Exhibits T and U were marked for identification.)

THE COURT: Did somebody rescue back that book that belonged to the library?

THE COURT: Is it down there?

MR. FRIEDMAN: I don't see it down here and I don't think I put it away.

(Pause.)

THE COURT: If you want to get a Xerox of the page from that book, you may.

MR. FRIEDMAN: I wonder if I can ask Mr. Sangara Monday to make a Xerox? May I suggest what we mark is page 172 that was clipped and perhaps the front piece of the book so we know what book it is.

MR. KAIN: Does it have an edition?

MR. FRIEDMAN: This is the 13th edition of Knight's Modern Seamanship.

The clipped page and page 172. You do not have to do 173.

THE COURT: We will do that.

I had with me on the bench a group of memos which

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had been handed to me during the trial covering the various points of evidence. I think I have it now. There is a memo received October 14th from Mr. Friedman's office entitled "Plaintiff's Memorandum Re Plaintiff's Right to Directed Verdict on Liability and as to Requests to Charge."

MR. FRIEDMAN: I think that is exactly it, your Honor. This is the one I would like marked.

(Plaintiff's Exhibit 21 was marked for identification.)

(Defendant's Exhibit V was marked for identification.)

THE COURT: Now, have we got all of the exhibits?

THE CLERK: Everything is marked, plaintiff's and defendant's exhibits, for identification.

THE COURT: How about motions?

MR. FRIEDMAN: I think the motions, we have a certain number of days available.

I forget whether it is 10 or 15.

THE COURT: So you are reserving your motions for the appropriate time?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: I guess that is it. We talked all day and I can't think of any more to say but thank you all very much.

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